

um  
**PROCEEDINGS**

**OF THE**

**American Society of International Law**

**AT ITS**

**TENTH ANNUAL MEETING**

**HELD AT**

**WASHINGTON, D. C.**

**APRIL 27-29, 1916**

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CONSTITUTION  
OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW<sup>1</sup>

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ARTICLE I

*Name*

This Society shall be known as the American Society of International Law.

ARTICLE II

*Object*

The object of this Society is to foster the study of International Law and promote the establishment of international relations on the basis of law and justice. For this purpose it will coöperate with other societies in this and other countries having the same object.

ARTICLE III

*Membership*

Members may be elected on the nomination of two members in regular standing by vote of the Executive Council under such rules and regulations as the Council may prescribe.

Each member shall pay annual dues of five dollars and shall thereupon become entitled to all the privileges of the Society, including a copy of the publications issued during the year. Upon failure to pay the dues for the period of one year a member may, in the discretion of the Executive Council, be suspended or dropped from the rolls of membership.

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<sup>1</sup>The history of the origin and organization of the American Society of International Law can be found in the Proceedings of the First Annual Meeting at p. 23.

The Constitution was adopted January 12, 1906.

Upon payment of one hundred dollars any person otherwise entitled to membership may become a life-member and shall thereupon become entitled to all the privileges of membership during his life.

A limited number of persons not citizens of the United States and not exceeding one in any year, who shall have rendered distinguished service to the cause which this Society is formed to promote, may be elected to honorary membership at any meeting of the Society on the recommendation of the Executive Council. Honorary members shall have all the privileges of membership, but shall be exempt from the payment of dues.

#### ARTICLE IV

##### *Officers*

The officers of the Society shall consist of a President,<sup>2</sup> nine or more Vice-Presidents, the number to be fixed from time to time by the Executive Council, a Recording Secretary, a Corresponding Secretary, and a Treasurer, who shall be elected annually, and of an Executive Council composed of the President, the Vice-Presidents, *ex officio*, and twenty-four elected members, whose terms of office shall be three years, except that of those elected at the first election eight shall serve for the period of one year only and eight for the period of two years, and that any one elected to fill a vacancy shall serve only for the unexpired term of the member in whose place he is chosen.

The Recording Secretary, the Corresponding Secretary and the Treasurer shall be elected by the Executive Council from among its members. The other officers of the Society shall be elected by the Society, except as hereinafter provided for the filling of vacancies occurring between elections.

At every annual election candidates for all offices to be filled by the Society at such election shall be placed in nomination by a Nominating Committee of five members of the Society previously appointed by the Executive Council, except that the officers of the first year shall be nominated by a committee of three appointed by the Chairman of the meeting at which this Constitution shall be adopted.

All officers shall be elected by a majority vote of members present and voting.

All officers of the Society shall serve until their successors are chosen.

<sup>2</sup>See Amendments, Article 1, p. x.

## ARTICLE V

*Duties of Officers*

1. The President shall preside at all meetings of the Society and of the Executive Council and shall perform such other duties as the Council may assign to him. In the absence of the President at any meeting of the Society his duties shall devolve upon one of the Vice-Presidents to be designated by the Executive Council.

2. The Secretaries shall keep the records and conduct the correspondence of the Society and of the Executive Council and shall perform such other duties as the Council may assign to them.

3. The Treasurer shall receive and have the custody of the funds of the Society and shall disburse the same subject to the rules and under the direction of the Executive Council. The fiscal year shall begin on the first day of January.

4. The Executive Council shall have charge of the general interests of the Society, shall call regular and special meetings of the Society and arrange the programs therefor, shall appropriate money, shall appoint from among its members an Executive Committee and other committees and their chairmen, with appropriate powers, and shall have full power to issue or arrange for the issue of a periodical or other publications, and in general possess the governing power in the Society, except as otherwise specifically provided in this Constitution. The Executive Council shall have the power to fill vacancies in its membership occasioned by death, resignation, failure to elect, or other cause, such appointees to hold office until the next annual election.

Nine members shall constitute a quorum of the Executive Council, and a majority vote of those in attendance shall control its decisions.

5. The Executive Committee shall have full power to act for the Executive Council when the Executive Council is not in session.

6. The Executive Council shall elect a Chairman, who shall preside at its meetings in the absence of the President, and who shall also be Chairman of the Executive Committee.

## ARTICLE VI

*Meetings*

The Society shall meet annually at a time and place to be determined by the Executive Council for the election of officers and the transaction of such other business as the Council may determine.

Special meetings may be held at any time and place on the call of the Executive Council or at the written request of thirty members on the call of the Secretary. At least ten days' notice of such special meeting shall be given to each member of the Society by mail, specifying the object of the meeting, and no other business shall be considered at such meeting.

Twenty-five members shall constitute a quorum at all regular and special meetings of the Society and a majority vote of those present and voting shall control its decisions.

## ARTICLE VII

### *Resolutions*

All resolutions which shall be offered at any meeting of the Society shall, in the discretion of the presiding officer, or on the demand of three members, be referred to the appropriate committee or the Council, and no vote shall be taken until a report shall have been made thereon.

## ARTICLE VIII

### *Amendments*

This Constitution may be amended at any annual or special meeting of the Society by a majority vote of the members present and voting. But all amendments to be proposed at any meeting shall first be referred to the Executive Council for consideration and shall be submitted to the members of the Society at least ten days before such meeting.

## AMENDMENT

### *Article 1<sup>a</sup>*

Article IV is hereby amended by inserting after the words "The officers of the Society shall consist of a President," the words "an Honorary President."

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<sup>a</sup>This amendment was adopted at the business meeting held April 24, 1909.

TENTH ANNUAL MEETING  
OF THE  
AMERICAN SOCIETY OF INTERNATIONAL LAW  
SHOREHAM HOTEL, WASHINGTON, D. C.,  
APRIL 27-29, 1916  
**FIRST SESSION**

Thursday, April 27, 1916, 8 o'clock p.m.

The tenth annual meeting of the American Society of International Law was called to order by the President of the Society, the Honorable Elihu Root.

The PRESIDENT. The Society will come to order, and thereby differentiate itself from all others in the field of international law.

It may strike some persons as singular that we are having an annual meeting when it is only four months since the last annual meeting. That is due to the great rapidity with which international events travel in these recent days, and the sharp curves they take, so that if you wish to locate the line you have to make many points.

THE DECLARATION OF THE RIGHTS AND DUTIES OF  
NATIONS ADOPTED BY THE AMERICAN INSTITUTE  
OF INTERNATIONAL LAW.

OPENING ADDRESS OF ELIHU ROOT,

*President of the Society*

With this meeting we finish the first decade of this Society. How great is the change of conditions in the field of international law during that period. Ten years ago all the governments of the world professed unqualified respect and obedience to the law of nations, and a very small number of persons not directly connected with government knew or cared anything about it. In this country at least international law was regarded as a rather antiquated branch

of useless learning, diplomacy as a foolish mystery, and the foreign service as a superfluous expense. Now that governments have violated and flouted the law in many ways and with appalling consequences, the people of this country at least have begun to realize that observance of the law has a real and practical relation to the peace and honor of their own country and their own prosperity. They are beginning to take an interest in the subject, to discuss it in the newspapers, to inquire how observance of the law may be enforced. There appears a dawning consciousness that a democracy which undertakes to control its own foreign relations ought to know something about the subject. If we had not established this Society ten years ago to study and discuss and spread a knowledge of international law it would surely be demanded now, and we may be certain that our annual public discussions and the publication of the admirable *Journal* which we have always maintained, with its definite and certain information upon international events, its interesting and well informed discussion of international topics, and its supplements, with their wealth of authentic copies of international documents, have contributed materially towards fitting the people of our country to deal with the international situations which are before them.

Following our example, all the American countries have established similar societies, so that there are now twenty-one such societies on the American continents. In most cases these societies have been organized with the direct approval and sympathy of the government of the country and they include in their numbers a large part of the most eminent leaders of opinion in all the American states. Still another institution has been created in the American Institute of International Law, composed of delegates selected, to a limited number, by each of these national societies. This institution has been established not as a competitor of the *Institut de Droit International*, which selects its members from among all the civilized countries, and not with the idea that there is such a thing as American international law to be distinguished from general international law, but with the idea that there may be special American views upon international questions; that the circumstances of the American republics may make it desirable for them to insist upon and press forward the development of particular principles in the law; that there are varieties of opinion upon such subjects which it may be useful to subject to common discussion and comparison of views; that the promotion of the habit

of thinking broadly and internationally and not narrowly or locally, and a knowledge in each country of the points of view and habits of thought of each other country, will make all the American states more useful members of the family of nations, more considerate, more tolerant of differences of opinion, and more conscious of the international duties which are correlative to international rights.

The American Institute of International Law held its first meeting in Washington in December last, and, after a discussion in which representatives from all parts of the new world engaged, it adopted as its point of departure for future discussions a declaration of the rights and duties of nations which I commend especially to your attention. The declaration was in these words:

#### DECLARATION OF THE RIGHTS AND DUTIES OF NATIONS

I. Every nation has the right to exist, and to protect and to conserve its existence; but this right neither implies the right nor justifies the act of the state to protect itself or to conserve its existence by the commission of unlawful acts against innocent and unoffending states.

II. Every nation has the right to independence in the sense that, it has a right to the pursuit of happiness and is free to develop itself without interference or control from other states, provided that in so doing it does not interfere with or violate the rights of other states.

III. Every nation is in law and before law the equal of every other nation belonging to the society of nations, and all nations have the right to claim and, according to the Declaration of Independence of the United States, "to assume, among the Powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them."

IV. Every nation has the right to territory within defined boundaries and to exercise exclusive jurisdiction over its territory, and all persons whether native or foreign found therein.

V. Every nation entitled to a right by the law of nations is entitled to have that right respected and protected by all other nations, for right and duty are correlative, and the right of one is the duty of all to observe.

VI. International law is at one and the same time both national and international: national in the sense that it is the law of the land and applicable as such to the decision of all questions involving its principles; international in the sense that it is the law of the society of nations and applicable as such to all questions between and among the members of the society of nations involving its principles.

You will observe that this declaration states in the main familiar principles. We have long been accustomed to such statements in the text books. Indeed the official reporter of the Institute, in his commentary upon the declaration, undertakes to show and does show that every statement, far from being novel, is based upon the decisions of American courts and the authority of American publicists. Yet the declaration was not superfluous or unimportant. There is a vast difference between the occasional decisions of a national court or the opinions of individual students, and a unanimous agreement of representatives of all the sovereign states of the Western Hemisphere upon a statement in definite terms of fundamental principles of international right. A still more important reason for such a declaration lies in the fact that the fundamental principles declared, now stand denied or repudiated by the conduct of nations in the great war that rages in the old world.

This instrument asserts the right of every nation to continued existence, to independence, to exclusive jurisdiction over its own territory, and to equality with every other nation; and it denies the right of any nation to commit for its own protection or preservation, unlawful acts towards innocent and unoffending states. These are the fundamentals of international right. They involve the existence of a democratic community of nations in which each individual nation has the same rights and full liberty for their enjoyment, limited and limited only, by the equal rights of every other member of the community. The body of rules of action which long experience and general consent have worked out for the assertion and preservation of these rights and the application of the universal limitation upon them in the practical relations between nations constitutes international law. This scheme of organization of the civilized inhabitants of the earth is sharply distinguished from conditions of tribal hostility which prevailed during all the early part of human history and in which each separate tribe maintained its independence and liberty as best it could by force of arms in a normal relation of hostility to all other tribes, and it is equally distinguished from the condition of subordination and suzerainty in which a single nation, acquiring a preponderance of power, reduces other nations to submission and imposes upon them friendly relations with each other as equal vassals of the superior state. A familiar example of the one extreme is to be found in Europe during the Middle Ages and of the other in the

Roman Empire, and upon a smaller scale and for a brief period in the control of Napoleon over a large part of continental Europe. One condition affords independence to strong, civil societies at the expense of progress in civilization. The other condition fosters the arts of peace at the cost of liberty. The democratic organization of a community of nations, on a basis of acknowledged right, declared and protected by law, seeks to avoid both of these extremes, and the vast progress of civilization since the Peace of Westphalia, with the general advance of mankind in comfort, intelligence, individual freedom and opportunity, testify to the superior merit of the arrangement. Yet just as ordinary democracies composed of natural persons tend, unless continually restrained, to lapse into anarchy on the one hand or to seek security under autocracy on the other, this community of nations has hitherto been in a condition of unstable equilibrium, always in danger of being overturned in one direction or the other. The age-long struggle to maintain the balance of power in Europe, often misguided, as we can see in looking back, often controlled by selfish purposes, often violating the very rights it professed to preserve, has nevertheless been a constant effort to counteract these tendencies.

A careful examination of the undisputed facts which show the origin and conduct of the present war leaves no room for doubt that the entire basis of the community organization of nations upon which rests the structure of international law is put at issue in the struggle. The principles of action upon which the war was begun involve a repudiation of every element of fundamental right upon which the law of nations rests. The right of every nation to continued existence, to independence, to exclusive jurisdiction over its own territory, and equality with other nations, is denied. The right of any strong nation to destroy all those alleged rights of other nations in pursuit of what it deems to be useful for its own protection or preservation is asserted. Under this view what we have been accustomed to call fundamental rights would become mere privilege to be enjoyed upon sufferance according to the views of expedience held by the most powerful. If this view prevails the whole structure of modern international law will be without foundation; and the discussion of its rules with the nations who maintain this view must now be not a real appeal to any law, but merely a balancing of possible injuries and benefits. So long as these fundamental questions are unsettled all discussion of international law must be hypothetical, as if architects were to discuss the

elevation of a building while the ground plan remains undetermined. These propositions are the postulates of all reasoning regarding the rules of international law. All discussion of international right is based upon them, assumes assent to them. To discuss international law with a nation which denies these postulates can be nothing but an unreal and futile appearance of discussing the law. When your major premise is disputed you must establish that before you can go on with your argument. There is only one real question of international law today, and that is, whether these postulates of the law are to stand or not. As between nations which agree that they should stand there may be discussion as to international rules based upon that hypothesis, but as between nations which assert and nations which repudiate these fundamentals of the law there can be no real discussion except of expediency. The declaration of the American Institute of International Law arrays the members of all these American countries upon one side of this vital question of principle which is being fought out in the great war. Their act is altogether impersonal. It takes no account of responsibility or blame or racial feelings or friendships or enmities, and it is unmistakable. The representatives of all the American countries affirm the old basis of international right upon which depends the life, the independence and the legal equality of all small nations and the laws which protect them against the arbitrary power of the strong.

It will be useful to remember, however, that to be effective such declarations must be accompanied by conformity in the conduct of the nations adhering to the principles declared. There are some rules of national conduct which flow directly from the principles of national independence and equality but which do not always coincide with the impulses of sentiment or with the apparent requirements of immediate interest. On the one hand these principles require that nations shall refrain from interference with the internal affairs of other nations. It frequently happens that many persons, in the United States for example, strongly disapprove things that are done in other countries within the jurisdiction and affecting the citizens of those other countries and not affecting any country's international rights. Such acts may run counter to our ideas of liberty, of morality, of humanity, of fair business conduct. The strongest sentiments and interests may urge interference to prevent conduct which shocks or offends us, yet, failing some special and exceptional ground—some recognized inter-

national ground for intervention—we have no right to interfere, because interference would be an infringement upon the independent equality of the other state. The peace and order of the world require that each nation shall mind its own business and refrain from attempting to impose its ideas of conduct upon other equally independent states. This is not because the interference in the particular case might not be beneficial so far as that case goes; but because the right to interfere in one case carries with it the right to interfere in other cases; the determination of the question when interference is justifiable would necessarily rest with the interfering Power; and in the exercise of such a right all weaker states would become subject to the control of the stronger and ultimately to the control of the strongest. With the great varieties of race and custom and conceptions of social morality in the human family the right of each nation to conduct its own internal affairs according to its own ideas is of the essence of liberty. The rule which prohibits interference by other nations, with however good a purpose, is a rule against inevitable tyranny. It is not at all uncommon that the best impulses and sentiments of our own people in this country are enlisted in favor of action by our government which would do infinitely more harm than good, by breaking down the barrier which the principle of the independent equality of states presents against the evils of foreign domination.

On the other hand the assertion of the independent equality of states implies an interest on the part of all states adhering to the doctrine in having it preserved, and it follows necessarily that when one sovereign state is dealing not with its internal affairs but with its international relations and violates the rule of right as against another equal and independent state, all other equally independent states have a right to insist that the international rule shall be observed, and such insistence is not interfering with the quarrels of others but is an assertion of their own rights. In each case every state must be guided by its own circumstances and interests in determining how far it will go in supporting its interference. There can, however, be no doubt of the international right to interfere in behalf of the maintenance of the law. So far as it is possible to see now, if the issue of the present conflict leaves the fundamental basis of international law still existent, the possibility of securing conformity to the rules of law resting upon that basis will depend upon the recognition by the nations in general of the duty to interfere and insist upon the observance of the law

and upon the adoption by them of a practice in conformity with that duty. The exercise of such an international right was well illustrated when, in November, 1861, the commander of the United States man-of-war, the *San Jacinto*, took the Confederate commissioners, Messrs. Mason and Slidell, from the neutral British passenger vessel, the *Trent*. Upon England's demanding the surrender to her of Mason and Slidell the Prussian Minister for Foreign Affairs, Count Bernstorff, the father of the present German Ambassador to the United States, wrote to the Prussian Minister at Washington for communication to the American State Department a letter, dated at Berlin, December 25, 1861. He said:

The maritime operations undertaken by President Lincoln against the Southern seceding States could not, from their very commencement, but fill the King's Government with apprehensions lest they should result in possible prejudice to the legitimate interests of neutral Powers.

These apprehensions have unfortunately proved fully justified by the forcible seizure on board the neutral mailpacket the *Trent*, and the abduction therefrom, of Messrs. Mason and Slidell by the commander of the United States' man-of-war the *San Jacinto*.

This occurrence, as you can well imagine, has produced in England and throughout Europe the most profound sensation, and thrown not Cabinets only, but also public opinion, into a state of the most excited expectation. For, although at present it is England only which is immediately concerned in the matter, yet on the other hand, it is one of the most important and universally recognized rights of the neutral flag which has been called into question.

\* \* \* In the absence of any reliable information we were in doubt as to whether the captain of the *San Jacinto*, in the course taken by him, had been acting under orders from his government or not. Even now we prefer to assume that the latter was the case. Should the former supposition, however, turn out to be the correct one, we should consider ourselves under the necessity of attributing greater importance to the occurrence, and to our great regret we should find ourselves constrained to see in it not an isolated fact but a public menace offered to the existing rights of all neutrals.

The French Foreign Office wrote, on the third of December, 1861, to the French Minister in Washington:

The wish to contribute to prevent a conflict, imminent perhaps between two Powers towards which it is animated by sentiments equally friendly, and the duty to maintain certain principles essential to the security of neutrals with the effect of protecting the rights of its own flag from injury, have convinced it (the Government of the Emperor) after mature reflection, that it can not under these circumstances remain altogether silent.

M. Thouvenel then discusses the merits of the *Trent* affair, and proceeds:

Not wishing to enter into a more thorough discussion of the question raised by the capture of MM. Mason and Slidell, I have said enough about it, I believe, to establish that the Cabinet at Washington would not be able, without infringing upon the principles for which all neutral Powers are equally interested in assuring respect or without contradicting its own conduct up to this time, to give its approval to the proceedings of the commander of the *San Jacinto*.

The Austrian Government instructed its minister in Washington in the same sense.

Here was a case in which these great Powers asserted unhesitatingly their interest in maintaining the common right of nations to have the rules of international law maintained. The case happened to be free from those obstacles to frank expression which have been so frequently presented by the delicate adjustments necessary to preserve the balance of power in Europe, and accordingly the Powers expressed themselves freely. It never occurred to anybody to deny that they were within their rights. We can hardly doubt that their expressions had a material effect in leading to the action of the American Government in preventing war between Great Britain and the United States and in making effective a rule of law which protects the rights of all neutrals.

Any nation which adheres to the American Institute's Declaration of the Rights and Duties of Nations rests under a duty, whenever the law which declares and protects those rights is clearly violated or threatened, to follow some such course as these continental nations followed in the *Trent* case. This is not a duty created by law or by treaty. There is no legal obligation, but there is a moral obligation, supported by enlightened self-interest, such as urges every member of a civil community who is worthy of respect to give his voice, his in-

fluence, his example, towards the preservation of the law through which alone the community can continue to exist. If the nations really wish to have peace and order maintained by law they must take an interest in having the law observed. They must really mean it, and act accordingly.

Furthermore the declaration of the Institute asserts the subordination of nations to the obligations of morality. It denies that any aggregation of human beings in any state, under any form of government, can be superior to the duties of good faith, of justice, and of humanity. I shall not discuss that. No democracy, no republic, no form of government based upon the rights of men, can continue to live in a world which rejects that view. This republic can not continue to live in a world which rejects that view.

It is to be observed that this declaration, in which representatives of all the American countries unite, asserts for all the world as a matter of general public right the same principles which, somewhat more narrowly and upon a different ground, the famous declaration of President Monroe asserted in respect of the American Republics. The message of Monroe affirmed in effect that all the American states were to be regarded as members of the community of nations; that they were entitled to live, to be independent, to be treated as equals, and to be free from oppression by other Powers. He gave notice that the attempt by any European Power to override these rights of the American states would be regarded as unfriendly to the United States because it would be dangerous to the peace and safety of the United States. As we turn from the narrow limits of the Monroe Doctrine to the broader field of universal international right set forth in the declaration of the Institute, with the terrible lesson of the great war in our minds, we may well assert that the repudiation of these principles, the violation of these rules anywhere within the confines of civilization, is dangerous to the peace and safety of the whole community of nations. To the efforts of the community of nations towards defending its peace and safety against the destruction of the fundamental bases of its public right, the often quoted words of Mr. Calhoun regarding the Monroe Doctrine are applicable. He said, in the Senate, in 1848:

Whether you will resist or not, and the measure of your resistance—whether it shall be by negotiation, remonstrance, or some intermediate measure, or by a resort to arms; all this must

be determined and decided on the merits of the question itself. This is the only wise course. \* \* \* There are cases of interposition where I would resort to the hazard of war with all its calamities.

Whether the United States will soon have occasion or will long have the ability or the will to maintain the Monroe Doctrine lies in the uncertain future. Whether it will be necessary for her to act in defense of the doctrine or abandon it may well be determined by the issue of the present war. Whether when the occasion comes she will prove to have the ability and the will, to maintain the doctrine depends upon the spirit of her people, their capacity for patriotic sacrifice, the foresight and character of those to whose initiative in foreign affairs the interests of the people are entrusted.

Whether the broader doctrine affirmed by the American Institute of International Law is to be made effective for the protection of justice and liberty throughout the world depends upon whether the vision of the nations shall have been so clarified by the terrible lessons of these years that they can rise above small struggles for advantage in international affairs, and realize that correlative to each nation's individual right is that nation's duty to insist upon the observance of the principles of public right throughout the community of nations.

The PRESIDENT. I have very great pleasure in introducing to you for the second number on this program Honorable David Jayne Hill, formerly American Ambassador to Germany, who will address the Society upon the possible means of increasing the effectiveness of international law.

#### THE POSSIBLE MEANS OF INCREASING THE EFFECTIVENESS OF INTERNATIONAL LAW

ADDRESS OF DAVID JAYNE HILL,

*Formerly American Ambassador to Germany*

Mr. President, Members of the Society, Ladies and Gentlemen: I am greatly indebted to the President for defining the nature and significance of international law, and citing in illustration of it the declaration of principles of the American Institute. Within the brief twenty minutes assigned to me to aid in the solution of an extremely difficult subject it would be quite impossible to undertake to describe

in detail what is meant by international law. It will therefore be a convenient preface to what I have to say upon this subject if I remark that I understand by it a body of principles definitive of justice, supplemented by specific rules in order to obtain the consummation of justice; and that I understand, sir, is identical with the point of view of the American Institute which you have elucidated.

There is a general popular impression that, as compared with municipal law, international law is not well observed. It is true that the means of enforcing it are not only less perfectly organized but are essentially more restricted than those possessed by civilized communities for rendering effective their domestic legislation; but it is erroneous to suppose that, in normal conditions, international law is not generally obeyed.

It is, in fact, chiefly in time of war that serious infractions of previously accepted rules occur; and even then it is the laws of war that are most frequently violated. But, under like conditions of conflict, even in the most civilized countries, laws are often silent. Murder, arson, pillage, and every form of violence are liable to occur, and to be committed with impunity, whenever and wherever considerable masses of men resort to brute force for the accomplishment of their purposes. It is greatly to the credit of international jurisprudence that, foreseeing the probability of armed conflicts between nations, sharp discriminations have been formulated and accepted between permissible and prohibited forms of forceful procedure,—a tribute which imperfect human nature, conscious of its defects, has felt under obligation to pay to its nobler instincts.

That these rules of conduct should in the storm and stress of conflict sometimes be forgotten, or even deliberately disregarded, certainly is not surprising; yet instances are not wanting of lofty heroism and generous chivalry in rendering homage to them, even in the heat of battle, and when they have seemed to bar the path to otherwise certain military advantage. It would be, indeed, astonishing if, in every instance, the whole complicated code of land and sea warfare were ever entirely obeyed.

Nor should we be despondent of the ultimate destiny of international law, if in the life-and-death struggle of nations the plain and unquestionable rights of neutrals and non-combatants should sometimes suffer serious infraction. Almost inevitably, both on land and sea, in a great modern war, non-participants must be subjected not

only to numerous inconveniences but to the possible loss of life and especially of property within the area of active military operations. It is only where these losses and injuries are deliberately inflicted, with foreknowledge of the probability of their occurrence,—not to mention so gross a violation of neutral rights as purposive inhumanity,—that serious complaint against belligerents is justified. Even in such cases a distinction must be drawn between the destruction of neutral life and neutral property; for in the latter case complete restitution can be made, while in the former there is no possible reparation. Here at least, unless the violation of its rules can be entirely prevented by means so peremptory as to command for them universal and unqualified respect, international law offers no protection.

There is, therefore, much more than a merely academic interest in the problem set before us in the topic now under discussion,—the possible means of increasing the effectiveness of international law.

It is, however, desirable to call attention to the fact that this problem is not, properly speaking, one of jurisprudence but one of social and political dynamics. Jurists are preoccupied with the perfection of law as a system of rules for the realization of justice, but the means of enforcing these rules can not be supplied by the law itself. This latter is the task of sociologists and statesmen, who are called upon, on the one hand, to induce a voluntary disposition to obey the law, and on the other to devise the processes by which refractory nations may be compelled to respect it.

International law suffers the disadvantage that, while the members of a given community of men are all interested in the enforcement of law within their own territorial limits, in questions of international law that same community may, with perfect solidarity, find its interest in a violation of the law. In this manner whole nations may contribute their entire strength to opposing the enforcement of the most evident principles of justice, because the nation as a whole profits by this illegality.

This frank placing of interest above obligation is usually justified by asserting the absolute sovereignty supposed to inhere in the nature of a sovereign state. So long as that recourse is left open to a recalcitrant nation, there can be no firm foundation for a science of international jurisprudence; for, by the assumption that sovereignty is merely "supreme power," and as such is the source of law, not subject to it, it is admitted that sovereign states are not jural entities, but only

arbitrary forces, each one of which finds its supreme rule of conduct in its own unqualified will.

The first and most important possible means of rendering international law more effective is, therefore, to destroy and exterminate from the minds of men this false and pernicious dogma of absolute sovereignty, which does not in truth possess any foundation in the principles of jurisprudence considered as a science.

Such terms as *imperium*, *majestas*, and *sovereignty* are merely abstract attributes derived from forms of political organization based upon superior physical force alone, and contain no vestige of that ethical authority upon which modern constitutional states are founded.

It would carry us far afield to enter at this time upon the history and refutation of the dogma of absolute sovereignty. It is sufficient here to say that the effort to bind a sovereign state founded upon this dogma by the meshes of mere customs, treaties, and conventions—which constitute the substance of international law—must forever prove illusory; for the reason that the acceptance of these depends entirely upon its own arbitrary will, and when they are contrary to what it conceives at the time to be its interest they will not receive its sanction. The usages of the past are readily discarded as being no longer useful. Treaties and conventions—even such as have been solemnly entered into for temporary reasons—may with equal readiness be repudiated, regardless of their terms, on the principle that obligations exist only *rebus sic stantibus*. Thus the whole body of international law, to a state thus conceived, is suddenly resolved into thin air.

Although this conception of absolute sovereignty runs through our theories of the state and the law books based on those theories, it does not in reality appeal to a thoughtful mind. It is partly of a metaphysical and partly of a religious origin. On its metaphysical side it involves the fallacy of constructing a theory of the state upon a purely abstract idea borrowed from a particular phase of state existence—the unlimited authority of an absolute ruler. But, today, constitutional government has put an end in most countries to that type. On its religious side it regards the sovereignty of the state as derived from what theologians have taught regarding the sovereignty of God. But with the disappearance of belief in the divine right of the monarch vanishes the preposterous notion that such unlimited authority can inhere in any community of mortal men.

If we retain the word "sovereignty" at all, as we probably must, we should define it as a prerogative inherent in a free community to form a government for the preservation of the right of its members to life, liberty, and property. But such a fundamental right does not create authority to attack other communities, destroy their inhabitants, and annex their territories. There is no right in the mass that is not derived from the rights of the individuals that compose it. The only sovereignty that can be scientifically justified is grounded upon principles of justice rather than upon mere power, even though it be in fact supreme.

If the state is in its true nature a juristic person, international law must not be thought of as a mere compound of fortuitous customs and conventions. It is law in a real sense, and can not arbitrarily be set aside at will. It is a product of reason adjusted to universal human needs.

It is not sufficient, therefore, that a government should exist *de facto* in order to be admitted into the society of sovereign states. It must in addition accept the principles of international law as binding upon it, or it may justly be refused admission into that society, or be excluded from it for gross violations of those principles.

This is constitutionalism, as distinguished from absolutism, and furnishes a ground on which all truly constitutional states might combine to increase the effectiveness of international law.

When we inquire what means of compulsion, if any, may be employed against states that refuse to conform to international law, we are confronted with two questions: Who is to determine in a specific case what the law is? and, Who shall see that it is executed when it is determined?

There being no central executive authority—and thus far no actual judicial authority—each nation is left to vindicate its own rights; a situation which leaves the small and weak states at the mercy of the great.

It is natural, therefore, that every constitutionally minded man should at once propose to create these central authorities—a World Court, and a World Police.

This is all very fine on paper, but the practical difficulties are enormous. Most of these proposals virtually imply the formation of a World State.

A World Court is, however, by no means a chimera. We have

already come very near to establishing it for a certain class of cases, namely, those of a purely juridical character. But these are not the most vexatious causes of international conflict. These are to be found in policies of commercial and territorial expansion and exclusion, which no court could ever settle. Still, it would be a great gain if a World Court could be established even with a limited jurisdiction.

But the idea of a World Police touches the most sensitive nerve in the international organism, for this necessarily involves naval and military authority. If there is difficulty in selecting international judges, how much greater the difficulty in confiding to a single commander the punitive powers of a real executive!

Nor is there much encouragement to believe in the possibility of a League to Enforce Peace, unless we can first conceive of the possibility of a League to Enforce Justice; for where there is no assured justice there can be no permanent peace. It is, and always will be, justice, not peace, that will present the real problem. When we can secure universal justice the world may have universal peace, but not before.

It is to the great Powers that mankind must look for both peace and justice, for they alone can impose them. If they could act together the problem might be quickly solved; but they will never act together so long as the state is regarded as the embodiment of arbitrary and irresponsible power, whose chief function is to extend the interests of a particular community, without regard to the equal rights of other nations, great and small.

It is, therefore, probable that until the constitutional idea dominates over the absolute idea regarding the nature and authority of the state, each nation will have to defend its own international rights, either alone or with the aid of such others as it may be able to associate with itself for the accomplishment of its purposes. The final triumph of international law, if it is finally to prove victorious, will, no doubt, be brought about by the great Powers. Their responsibility is enormous, and until it can be made collective it must remain individual. To be a great Power and not to bear its responsibilities is to be recreant to duty. International law is *our* law, and is so recognized by our court decisions. Not to stand for it is to fail in the first duty of a civilized state. To be silent is to be acquiescent; but to speak with authority it is necessary to be strong.

There is, of course, a possibility of standing for international law in such a manner as to make the act impressive without participating in the quarrels of others in which it is undesirable to take part. It is no proper ground of offense, and it should not be considered to be one, for a nation to voice its convictions and to exercise its influence in behalf of an interest which it shares with all others. But when a nation's own rights are violated, having no other redress, it is called upon not only in its own interest, but in the interest of the law itself, to vindicate them not merely by words but, if necessary, by actions also. If this is not done, international law must lose the respect of mankind and fall into positive disrepute.

This leads naturally to the consideration of reprisals—a topic too complex for discussion here. But even without them there remains at least one course, which is imperatively demanded, if international law is to be made more effective—the severance of diplomatic and commercial relations with a persistent lawbreaker. A nation that, after remonstrance, persists in the violation of the law can no longer pretend to be acting in a friendly spirit, and when friendship has ceased it is only an evidence of weakness and hypocrisy to pretend that it still exists.

The PRESIDENT. The Society is very much obliged to you for your attendance this evening, and the meeting will stand adjourned until 10 o'clock tomorrow morning, in this same room.

## SECOND SESSION

Friday, April 28, 1916, 10 o'clock a.m.

The meeting was called to order by Mr. JAMES BROWN SCOTT, Recording Secretary of the Society.

Mr. SCOTT. Gentlemen, I regret to inform you that Mr. Root will be unable to preside this morning and, therefore, I am taking the liberty as Recording Secretary of the Society to open the meeting. I shall ask Professor George G. Wilson, a member of the Executive Council, to act as chairman of the meeting. He has asked me to read the two rules of the Society regarding the time to be allowed the speakers. They are as follows:

Principal papers and addresses may not exceed twenty minutes in delivery, and informal papers or discussions may not exceed ten minutes for each speaker.—Resolution of the Executive Council, April 30, 1910.

The presiding officer is required to call for the next speaker at the expiration of the time allotted.—Resolution of the Executive Council, December 30, 1915.

The Chairman has asked me to make the announcement that these two rules will be rigorously enforced.

The CHAIRMAN. Gentlemen, the subject of discussion this morning is the relation of the exportation of arms and munitions of war to the rights and obligations of neutrals, a subject which has received some consideration from various points of view in the United States during the last several months.

The first speaker is Dr. James W. Garner, Professor of Political Science in the University of Illinois.

### SOME TRUE AND FALSE CONCEPTIONS REGARDING THE DUTY OF NEUTRALS IN RESPECT TO THE SALE AND EXPORTATION OF ARMS AND MUNITIONS TO BEL- LIGERENTS.

ADDRESS OF JAMES W. GARNER,

*Professor of Political Science in the University of Illinois*

To impeach successfully the expediency or morality of a rule of international law which has been approved by the vast majority of

text writers and jurists from Gentilis to the present, which has been observed in practice by nearly all states during the wars of the past, and which has recently been sanctioned by an international convention ratified by all the states of the world, with a few unimportant exceptions, is certainly not an easy task. Apparently the only text writers of repute who have attacked the existing rule, either upon grounds of morality or of policy, are Woolsey<sup>1</sup> and Field,<sup>2</sup> in the United States; Phillimore,<sup>3</sup> in England; Hautefeuille,<sup>4</sup> Pistoye, and Duverdy,<sup>5</sup> in France; Kleen,<sup>6</sup> of Sweden; Gessner,<sup>7</sup> of Germany; and Brusa,<sup>8</sup> of Italy. With the exception of Kleen and Brusa, all of them, it may be added, are found in the category of the older writers.

A few writers, of whom Bluntschli is the best known, have undertaken to draw a distinction between the sale and exportation of arms and munitions in small quantities and traffic on an extensive scale (*Zwischen sendungen im Grossen und Kleinen*), the former of which they regard as unobjectionable, but the latter of which it is the duty of neutral governments to prevent.<sup>9</sup> This distinction is also made in the German war manual (*Kriegsbrauch im Landkriege*).<sup>10</sup> But it is not founded on any sound principle, and in practice it would be difficult if not impossible to apply it.<sup>11</sup>

No writers, it may be added, have defended the existing rule more vigorously than those of Germany. Geffcken, one of the most distinguished of the German authorities, has considered the traffic in

<sup>1</sup>International Law, p. 320.

<sup>2</sup>Outlines of an International Code, sec. 946.

<sup>3</sup>International Law, Vol. III, sec. 230.

<sup>4</sup>*Droits et Devoirs des nations neutres en Temps de Guerre*, tome II, p. 424.

<sup>5</sup>*Traité des Prises Maritimes*, t. I, p. 394.

<sup>6</sup>*Lois et usages de la neutralité*, t. I, sec. 93, also his *Contrebande de Guerre*, pp. 52, 67.

<sup>7</sup>*Le Droit des Neutres* (Fr. trans.), p. 126.

<sup>8</sup>Quoted by von Bar in the *Revue de Droit International*, Vol. XXVI (1894), p. 404.

<sup>9</sup>*Droit International Codifié* (Ed. by Lardy), sec. 766.

<sup>10</sup>Part III, sec. 3, par. b.

<sup>11</sup>This has been shown by many writers, for example, by Geffcken, in Holtzendorff's *Handbuch des Völkerrechts*, Bd. IV, p. 690; von Bar, *Revue de Droit International*, Vol. 26, p. 401; Lawrence, *Principles*, p. 699; Oppenheim, *Int. Law*, Vol. II, p. 377; and Snow, *International Law*, p. 134.

arms and munitions at length and has pronounced the opinion that not only are neutral governments not bound to prohibit such trade, but that the attempt to do so would entail upon them impossible responsibilities.<sup>12</sup> Professor von Bar of Göttingen, an equally distinguished German jurist, has pronounced one of the strongest arguments in favor of the right of neutrals to sell and export munitions of war to belligerents to be found in the whole literature of international law. The prohibition of trade in contraband goods, he says, "would injure incalculably not only the commerce of neutrals, but even their manufacturing industry, and in a large measure the production of their agriculture, forests, and mines, reduce a considerable part of their population to starvation," and necessitate a system of surveillance and control by neutrals over the sale and transportation of merchandise which would be intolerable. "If two states go to war with each other," he says, "the world is not bound to suspend its customary pursuits in order to prevent one of the belligerents from deriving an advantage or suffering a disadvantage in consequence of such trade. To hold the contrary is to assume that belligerents, as such, have a right to dominate the rest of the world. What a belligerent has a right to expect is only that the relations between his adversary and neutral states shall remain as they were before the war; consequently, the subjects of neutral states may continue to maintain commercial relations as formerly, and if they manufacture arms and munitions and have, before the war, sold them to everybody, they may continue to do so after the outbreak of war, even to belligerents." Moreover, he says, there is nothing morally reprehensible in such business.<sup>13</sup> An examination of the treatises of a large number of German writers reveals the fact that Gessner is the only one of repute who denies the wisdom of the existing rule.<sup>14</sup>

The practice of states, as I have said, has uniformly been in accordance with the view of the jurists, which recognizes an entire consistency between the sale of arms to belligerents and the obligations of neutrality. The Government of the United States has on several well-known occasions prohibited generally the exportation of

<sup>12</sup>*Der Handel mit Waffen und Kriegsmaterial*, in Holtzendorff's *Handbuch*, Bd. IV, sec. 152.

<sup>13</sup>See his article entitled *Observations sur le contrebande de guerre* in the *Revue de Droit International et de Législation comparée*, Vol. XXVI (1894), pp. 401 ff.

<sup>14</sup>*Le Droit des Neutres sur mer* (French trans.), p. 126.

arms and munitions as a measure of conservation when it was itself a belligerent, or the exportation to neighboring Latin American countries not as a neutrality measure, but for purposes of pacification or in pursuance of a policy founded upon the existence of peculiar and long-recognized relations between the United States and the neighboring republics of Latin America. The few instances of prohibitions laid by Great Britain have been the result of treaty stipulations, as in the case of the embargo of 1822, at the outbreak of the war between Spain and her South American colonies, and that of 1848, at the beginning of the war between Denmark and Prussia; or they were resorted to when Great Britain was herself a belligerent, as during the Crimean War and the present war, for the purpose of conserving her own supply of munitions.<sup>15</sup> German practice has been substantially the same. Apparently the only instance of a German embargo is to be found in two decrees of the Prussian Government issued in 1854 and 1855, prohibiting the transit through Prussian territory of arms and other contraband from Belgium to Russia; but it appears that little effort was made to enforce either decree, and when the British Government called the attention of the Prussian Government to the matter it replied that the Government was not justified in interfering with the course of trade.<sup>16</sup>

The recent assertion that Germany prohibited the sale and exportation of arms to Spain during the Spanish-American War, like many

<sup>15</sup>In a recent petition addressed to the President and Congress alleged to have been signed by 1,000,000 American citizens, the statement was made that "on April 23, 1898, after the Spanish-American War had begun the British Government placed an embargo on munitions of war." This statement, like many others made by the embargo propagandists in this country, is not true. The Queen's neutrality proclamation of April 23, 1898, merely warned British subjects that if any of them committed certain acts, among which was the carrying of arms and munitions to either belligerent, their ships and goods would be liable to capture and confiscation. See the text in *Proclamations and Decrees of Neutrality in the War with Spain*, p. 35. The British proclamation did not prohibit such trade, and no penalties were prescribed for engaging in it. In fact, military supplies were purchased in Great Britain by both belligerents. Indeed, the English colony of Jamaica is said to have become the chief source of supply for the Spanish army in Cuba, and except for a mild protest from the American consul at Kingston, no complaint was made by the American Government. Benton, *International Law and Diplomacy of the Spanish-American War*, pp. 195-196.

<sup>16</sup>See Earl Granville's note of September 15, 1870, to Count Bernstorff, *British and Foreign State Papers*, Vol. 61, p. 761. "During the whole of the Crimean War," says Earl Granville, "arms and other contraband were copiously supplied to Russia by the states of the Zollverein; regular agents for traffic were established at Berlin, Magdeburg, Thorn, Königsberg, Posen, Bromberg, and other places and no restraint was put upon their operations."

others made by German propagandists in this country, is without foundation. In fact, during the entire war arms and munitions were freely carried from German ports to both Spain and the United States.<sup>17</sup>

There have, of course, been a few instances of embargoes laid on grounds of neutrality. During the Franco-German War the Governments of Belgium, Switzerland, Austria-Hungary, Denmark, Spain, Italy, The Netherlands, and Japan, prohibited the exportation of arms and munitions to both belligerents.<sup>18</sup> During the Spanish-American War the Governments of Brazil, Portugal, and Denmark, forbade the transportation of war material to either belligerent, although the Danish proclamation did not prohibit the sale of such articles.<sup>19</sup> The Government of the Dutch colony of Curaçao, under instructions from the Government of The Netherlands, published a decree forbidding the exportation of arms and munitions and other war material to either belligerent.<sup>20</sup>

Upon the outbreak of the present war the Brazilian neutrality regulations, Article 4 of which "absolutely forbids" the export of arms and munitions to any belligerent port, were put into effect.<sup>21</sup> Embargoes were also laid by various neutral states of Europe, notably Denmark, Norway, Sweden, Spain, and The Netherlands. The latter have, however, been erroneously regarded as neutrality measures. In fact they were laid partly under pressure from Great Britain as a means of protecting their oversea commerce against the measures adopted by Great Britain against the transit and reexportation to Ger-

<sup>17</sup>See a letter of Andrew D. White, American Ambassador to Spain in 1898, to W. B. Blake, dated October 6, 1915, printed in the *New York Times* of January 29, 1916, and in the *Fatherland* of February 9, 1916. See also extracts from the diplomatic correspondence relating to the matter, in an article by W. C. Dennis, Esq., in the *Annals of the American Academy of Political and Social Science*, July, 1915, pp. 13-14, and the official statement of the Secretary of State published in the daily press of April 23, 1915.

<sup>18</sup>Bluntschli, *op. cit.*, sec. 766, and Rivier, *Droit des Gens*, Vol. II. p. 412. Rivier says all the states above mentioned issued such proclamations, but Kleen does not include Austria-Hungary, Denmark, Spain, Italy, or The Netherlands in the list which he gives. *Lois et usages*, I, 382, and *Contrebande de Guerre*, pp. 52, 68. Bonfils, secs. 1472 and 1474, mentions only Belgium, Switzerland, and The Netherlands.

<sup>19</sup>Proclamations and Decrees During the War With Spain, pp. 13, 22, 61.

<sup>20</sup>*Ibid.*, p. 27.

<sup>21</sup>See an article by Señor Da Gama, Brazilian Ambassador to the United States, in the *Annals of the American Academy of Political and Social Science*, July, 1915, pp. 147 ff.

many of contraband goods imported from abroad,<sup>22</sup> and partly with a view to conserving their own supply of arms and munitions for national defense in case they were subsequently forced into the war.<sup>23</sup> These measures, therefore, can hardly be relied upon as precedents in support of an argument for changing the general practice.

But it does not necessarily follow that because the weight of academic authority and the practice have been in favor of a particular rule, that changed conditions may not make its alteration or entire abandonment desirable. Thus the German memorandum of April 4, 1915, addressed to the Secretary of State, asserted that the situation in the present war differs from that of any previous war, and therefore any argument based on the conduct of states in the past is not conclusive. In the present war, it was pointed out, the United States is practically the only neutral nation of importance from which war supplies in considerable quantities can be obtained by belligerents. In consequence, a new and vast industry for the manufacture of arms and munitions has sprung into existence, an industry which, in the language of the Austro-Hungarian note of June 29, 1915, has "soared to unimagined heights." Thus it has come to pass that the United States has been transformed into a "veritable arsenal" exclusively for the supply of one belligerent and its allies. The rule of international law which relieves neutral governments from the obligation of prohibiting the sale and exportation of contraband originated, the German memorandum contended, in the necessity of protecting their *existing* industries and could not have been intended to afford protection to *new* industries called into existence in consequence of war. It is submitted, however, that the distinction between the sale of arms and munitions of war produced by establishments already in existence at the outbreak of war and the sale of those produced by newly created industries is not a sound principle for distinguishing between neutral and unneutral conduct. In effect the distinction is similar to that made by Bluntschli and the German General Staff in the *Kriegsbrauch im Landkreise* between sales in large quantities and sales in

<sup>22</sup>See my article on Contraband, Right of Search and Continuous Voyage in the American Journal of International Law, April, 1915, p. 393.

<sup>23</sup>Compare the remarks of Professor J. B. Moore before the American Academy of Political and Social Science, Annals, July, 1915, p. 146, and the remarks of W. C. Dennis, Esq., *ibid.*, p. 178. In the German memorandum of April 4, 1915, it is virtually admitted that the embargoes laid by the neutral Powers of Europe were measures unconnected with neutrality but were rendered necessary by the duty of "perfecting their own armaments."

small quantities. Like most quantitative distinctions, it rests upon no logical principle, and the attempt to apply a rule based on such a distinction would in practice lead to insuperable difficulties, as the German writers Geffcken and von Bar, as well as many others in England and America, have pointed out. Nor can it be admitted that the conception of neutrality is given a "new aspect" by the fact that the markets of a single neutral state have become the chief if not the sole source of the foreign supply of one or more belligerents. To assert such a view is to maintain that the sale of munitions by the citizens of one state is legitimate so long as the markets of other states may be drawn upon, but that it ceases to be consistent with the spirit of neutrality the moment the number of such states is reduced to one. Again it is submitted that such a distinction can have no place in determining the rules of neutral conduct.

Likewise, the contention recently put forward that since the quantity of arms and munitions sold to belligerents in former wars was comparatively small the practice in those wars can not be regarded as precedents to justify a traffic of such proportions as that which the business has assumed in the present war, ignores the difference between the magnitude of those wars and that of the present conflict. It has been stated by the British Minister of Munitions that less ammunition was used by the British forces during the entire Boer War than was consumed in a single well-known battle during the present war. To hold that it is not unneutral for a state to permit its subjects to furnish arms and munitions to belligerents so long as the magnitude of the war is not such as to require large quantities of such supplies, but that it becomes unneutral when by reason of the widespread character of the war the demand assumes large proportions, is again to introduce a quantitative distinction in the place of a distinction founded on principle. In cases of world-wide wars like the present conflict the recourse to neutral markets will naturally be larger, and it is impossible to fix a point beyond which permission to resort to those markets ceases to be consistent with neutrality, if recourse in any degree is to be recognized as lawful. In short, the measure of neutral conduct in such matters bears no relation to the proportion of supplies furnished and can not be determined on the basis of distinctions in respect to the magnitude of the war and the necessities which it creates.

The theory recently advanced that it is the duty of neutrals to so adjust their policies as to maintain a "parity" with respect to the various

belligerents, *i. e.*, to insure an equalization of advantages as between them all, by refusing to permit the exportation of supplies to one when the fortunes of war have deprived the other of access to neutral markets, is even less defensible. It is believed that no such extraordinary contention was ever seriously put forward by a belligerent in the past. If admitted it would, as Mr. Lansing said in his note of August 12, 1915, "impose upon every neutral nation a duty to sit in judgment on the progress of a war and to restrict its commercial intercourse with a belligerent whose naval successes prevented the neutral from trade with the enemy." Manifestly the effect of such a policy would be not the maintenance of neutrality but partiality.

But apart from special circumstances, it is argued that there are general considerations which make it desirable that the present rule should be altered. The furnishing of arms and munitions to belligerents, it is contended, is contrary not only to the best standards of ethical conduct but to sound principles of national and international policy. Thus, said Senator Works, of California, in a speech in the Senate on January 27, 1916:

I believe the trade to be immoral and demoralizing to the people of the United States. I believe that most of the complications that have grown up between this and foreign nations now at war have been the result of the trade in munitions of war. I believe that if it had not been for the fact that we are dealing in that nefarious trade the people upon the *Lusitania* would not have lost their lives.

We have, in effect, made our country a party to the war across the ocean. It is our ammunition, our shot and shell, that are taking the lives of the citizens and subjects of friendly nations in Europe. We can not justify ourselves in that position or in that trade by saying that it is allowed by the laws of neutrality. There is something higher that should control the people of the United States than the mere strict law of neutrality.<sup>24</sup>

<sup>24</sup>Congressional Record, 64th Cong., 1st sess., p. 1797. Compare also the remarks of Senator Kenyon to the same effect, *ibid.*, p. 1793; of Senator LaFollette, *ibid.*, p. 1800; of Senator Ashurst, *ibid.*, p. 1796; of Senator Robinson, *ibid.*, p. 1797; of Representative Ricketts, *ibid.*, pp. 2657-2658; of Senator Hitchcock, *ibid.*, 63rd Cong., 3rd sess., p. 3938; of Representative Porter, *ibid.*, App., pp. 583-585; of Representative Vollmer, *ibid.*, App., pp. 735-736. See also a pamphlet entitled "Private Property and the Nation's Honor," by Aked and Rauschenbuch; Burgess, the European War, Ch. VII; an article by von Mach, "The German View Point," *Boston Transcript*, April 14, 1915; and Butte, Proceedings of the American Society of International Law, 1915, p. 129.

It is the veriest cant and hypocrisy, we are told, for a nation to pray for peace on Sunday and during the rest of the week devote their energies and resources to the manufacture and sale of the instruments of death with which to perpetuate a struggle in which the blood of thousands is being daily shed. Besides prolonging the duration of the war and swelling the volume of rivers of blood, the effect of such a traffic is to array citizens of a common country against one another, arouse animosities, provoke the enmity of foreign nations, and lay the foundations for future international controversies. Furthermore, it is asked, Why should it be regarded as unneutral for a government to sell arms and munitions to belligerents, but entirely consistent with neutrality for a government to allow its citizens to do so? Why maintain a double standard of conduct: one for the state and the other for the citizens who compose it?

"International law," said Senator Hitchcock in the Senate on February 17, 1915,<sup>25</sup> "is entirely out of harmony with the spirit of the age in permitting this traffic—it relates to a time and has its roots in an age when war was the legitimate method of settling disputes."

Time does not permit an extended answer to all these questions, but I venture to offer a few observations on some of them. First of all, it may be repeated that the existing rule has had the support of the almost uninterrupted practice of nations for centuries; it has been approved by all the text writers on international law from Grotius to the present, with scarcely more than a half-dozen notable exceptions, and it was sanctioned as late as 1907 by an international convention which received the almost unanimous approval of the states of the civilized world. The presumption, therefore, must be largely in favor of a rule of international conduct which has been thus approved by jurists, followed in practice by states, and sanctioned by international agreement. If authority, practice and common consent count for anything in determining the general consensus in respect to the value of a rule of conduct, the present practice rests upon solid foundations of morality and public policy, national and international. I venture also to raise the question whether ethically there is any substantial ground for a distinction between the sale of arms and munitions to a belligerent in time of war to be used immediately for killing his enemies, and sales in time of peace for

<sup>25</sup>Cong. Record, 63rd Cong., 3rd sess., p. 3938.

the purpose of putting him in readiness for killing possible enemies at some future time. If war is admitted to be a legitimate mode of settling international controversies, and Senator Hitchcock, who asserts the contrary opinion, does not tell us when it ceased to be so recognized, it seems difficult to deny the morality of making and selling the instruments by which it is carried on; and if it is not immoral to furnish them before an army takes the field, it is not immoral to do so afterwards.<sup>26</sup> Moreover, if it is ethically permissible to furnish a belligerent with cloth for making uniforms, cotton and other material for making explosives, coal for supplying warships, mules for drawing artillery, and other materials without which war can not be carried on, why is it any more reprehensible morally to sell arms and munitions? Ethically there is no sound basis for such a distinction, yet most of the embargo measures recently introduced in Congress proposed to prohibit the sale and exportation of arms and munitions only.

No line of distinction, as the late Professor Westlake once declared, can be drawn between the sale of munitions, on the one hand, and other articles which, though not directly employed for killing men, are essential to belligerents in the carrying on of war. "No principle can turn on the degree of proximity in which its employment contributes to the physical act of killing or wounding."<sup>27</sup> If the canons of morality or considerations of neutrality require prohibition of the sale of the one class of articles, they require equally a prohibition of the sale of the other. But if both classes should be prohibited, where is the line between prohibited and innocent goods to be drawn? As Earl Granville pointed out in his note of September 15, 1870, to Count Bernstorff:

in the American Civil War no cargoes would have been more useful to the Southern States than cloth, leather, and quinine. It would be difficult for a neutral, and obviously impossible for a belligerent to draw the line. Moreover, articles invaluable to a belligerent at one time may be valueless to another and *vice versa*. Is the neutral to watch the shifting phases and vary his restrictions in accordance with them?<sup>28</sup>

<sup>26</sup>Compare on this point the remarks of Professor T. S. Woolsey, in an article entitled "Case for the Munitions Trade," *Leslie's Weekly*, July 29, 1915.

<sup>27</sup>Collected Papers of John Westlake, pp. 379-380.

<sup>28</sup>British and Foreign State Papers, Vol. 61, p. 765.

In view of the source from which the recent attack upon the trade in arms and munitions emanated, it may be interesting to quote the views of a highly respected German jurist and one of the most eminent authorities on international law, Professor von Bar of Göttingen. After dwelling at length upon the serious injuries which an embargo would inflict upon the industries of neutral nations as well as the difficulties which would be encountered in enforcing such a measure, he proceeds to consider the moral aspect of the question. On this point he says:

It is wrong, therefore, to denounce, as has often been done, the sale of arms by neutrals to belligerents, as a business which pollutes the hands and honor of neutral countries. This phrase has no more force than a tirade launched against a fire insurance company, on the ground that it is engaged in a miserable business which draws its profits from the misfortunes of others.

"True progress," von Bar continues, "consists not in prohibiting trade in contraband goods, as Kleen and Brusa would do, but rather in abolishing the right of belligerents to interfere with such trade except through the exercise of the right of blockade. The argument sometimes advanced that the furnishing of arms and munitions to belligerents serves to prolong the duration of wars, and that a trade which draws its profits from bloody battles is condemned by the interests of humanity, von Bar pronounces as specious, and he quotes Lorimer as having pointed out with his usual sagacity that the object of war is not a temporary cessation of hostilities but a durable peace, and it is therefore wrong to force a nation to quit fighting by refusing to sell it the means of carrying on war, for in that case it is not really vanquished, and in a little while the struggle will be renewed."<sup>29</sup>

One of the most serious practical objections to the proposed change is to be found in the difficulty of enforcing prohibitory measures. Many writers and statesmen have called attention to this difficulty. Earl Granville, in his reply to the remonstrance of Count Bernstorff in 1870, asserted that if the exportation of arms and munitions was prohibited they would be exported clandestinely, to prevent which it would be necessary "to establish an intricate and inquisitorial customs

<sup>29</sup>These views of von Bar are set forth in an article entitled *Observations sur le Contrebande de Guerre*, published in the *Revue de Droit International et de Législation Comparée*, Vol. XXVI (1894), pp. 401 ff.

system, under which all suspicious packages, no matter what their assumed destination, would be opened and examined." "Moreover," he said. "it would cause infinite delay and obstruction to innocent trade."<sup>30</sup>

The difficulty of preventing such trade, Earl Granville went on to say, had been abundantly shown during the Crimean War. The Prussian Government had by a decree forbidden the transit through Prussian territory to Russia of arms and munitions, but the customs authorities were powerless to prevent violations of the law. If the Prussian authorities could not prevent such traffic across a land frontier, it would be still more difficult for Great Britain, which has no land frontier, since a ship leaving her ports may go where it pleases.<sup>31</sup>

As Spaight aptly remarks:

If a neutral Power were held responsible for all the commercial transactions of its subjects with belligerents, most of the nations of the world would have to rewrite their constitutions whenever a war began. The outbreak of hostilities between any two states would have the effect of establishing in every country not participating in the war a system of governmental interference with private persons and their business transactions which would only have to be tried once to stand condemned as intolerable and impossible.<sup>32</sup>

<sup>30</sup>British and Foreign State Papers, Vol. 61, p. 764. Compare the following remarks of the late Professor Goldwin Smith in a letter to Professor Max Müller of Oxford: "It would be too much to expect that whenever two nations chose to disturb the peace of the world, all the other nations should be required to prohibit lawful trading, and to turn their governments into detectives armed, as they must be for such a purpose, with arbitrary powers. You can not draw any real distinction between arms and other things needed by belligerents. One belligerent needs rifles, another saddlery, a third cloth for uniforms, a fourth biscuit, a fifth copper or iron." Goldwin Smith's Correspondence, ed. by Haustain, p. 35, quoted in an editorial in the *American Journal of International Law*, October, 1915, p. 930.

<sup>31</sup>Westlake remarks that if the exportation of contraband were prohibited, England would be the country in which with the best intentions and greatest activity on the part of the government, such a rule would be the worst observed and which would suffer most from international difficulties to which the breach of it would give rise. *Collected Papers*, p. 391. The Zulus, says Spaight (*War Rights on Land*, p. 478), who fought at Islandwana and Rorke's Drift in 1879, were armed with rifles which had been smuggled into Zululand by English traders who knew perfectly well for what purpose the arms were to be used. Spaight also remarks that the sword bayonets for the French *Chassepôts* used in the Franco-German War of 1870, though sold at Birmingham, were first imported from Germany and thus employed to kill Germans.

<sup>32</sup>*War Rights on Land*, p. 475.

Geffcken and von Bar have condemned the proposal to prohibit the exportation of arms and munitions largely for this reason. Geffcken<sup>33</sup> remarks that to attempt such a measure would be to impose upon neutrals impossible responsibilities. Von Bar<sup>34</sup> says it "would not only injure incalculably the commerce of neutrals," but it would "necessitate a system of surveillance and control over the sale and transportation of merchandise which would be intolerable."<sup>35</sup>

The obligation to prohibit such traffic being once recognized, legal responsibility for failure to enforce the prohibition follows as a consequence, and the neutral becomes exposed to liability for damages to an injured belligerent for neglect to exercise due diligence. As Lawrence observes, a nation "after having dislocated its commerce and aroused the anger of its trading classes, might possibly find itself arraigned before an international tribunal and cast in damages because a few cargoes had slipped through the cordon it maintained against its own subjects."<sup>36</sup> "No chain of mountains, and no coast line," says Lorimer, "has ever been or really could be guarded, and a state which undertook to do it would be exposed to the accusation of having failed in its engagements."<sup>37</sup>

The practical result of such a policy, therefore, would be to shift the responsibility which now rests upon belligerents themselves of intercepting shipments of contraband destined for the use of the enemy, to the shoulders of the neutral, who would become liable to

<sup>33</sup>*Der Handel mit Waffen und Kriegskonterbande*, in Holtzendorff, *Handbuch*, Bd. IV, sec. 152.

<sup>34</sup>*Observations sur le contrebande de Guerre*, *Revue de Droit International et de Lég. Comp.*, Vol. XXVI (1894), p. 401.

<sup>35</sup>The proposal to prohibit trade in contraband has also been criticized on the above mentioned grounds by Creasy, *First Platform of International Law*, p. 608; by Calvo, *Droit Int. Pub.*, Vol. V, sec. 2774; by Sir William Vernon Harcourt, *Letters of Historicus*; by Davis, *Elements of International Law*, p. 403; by Lawrence, *Principles*, p. 702 (who remarks that the effective enforcement of such a policy would require an army of spies and informers); and by many jurists at various sessions of the Institute of International Law, notably by Westlake and Lorimer at the meeting of 1875 (*Rev. de Droit International*, Vol. VII, pp. 605, ff) and by General den Beer Portugael and M. Lardy in 1894 (*ibid.*, Vol. XXVI, pp. 323 ff).

<sup>36</sup>*Principles of International Law*, 4th ed., p. 702.

<sup>37</sup>*Revue de Droit International*, etc., Vol. VII (1875), p. 609. In this connection it may be remarked that the ground upon which Great Britain remonstrated against the transit of arms through Prussia to Russia during the Crimean War was not that Prussia was bound to prohibit such traffic, but that having issued a decree for that purpose she was bound to enforce it. See Earl Granville's note of September 30, 1870, to Count Bernstorff, *British and Foreign State Papers*, Vol. 61, p. 762.

damages for failure to do it. Instead of removing what is admitted to be one of the chief sources of controversy between belligerents and neutrals, it is believed that such a rule would, by imposing burdensome if not impossible duties upon neutrals, greatly augment the already serious inconveniences to which they are subjected, and lay the foundations for international claims and controversies.<sup>38</sup>

Finally, another practical objection to a rule of law which would prohibit merchants of neutral states from selling arms, munitions and other war materials to belligerents, and one which has often been pointed out since the beginning of the recent agitation in this country for an embargo on the exportation of such articles, is to be found in the necessity which it would impose upon states which do not maintain large and fully equipped military establishments or which do not possess extensive industries for the manufacture of military armament, of purchasing and storing in time of peace adequate quantities of such supplies or of establishing new industries of their own upon which they could rely. In short, "unprepared" nations like the United States would be compelled to put themselves in a war posture in time of peace, to be in readiness at all times to meet any emergency; otherwise, in the event of attack by a state whose military and naval armaments are kept in a high state of equipment, they would find themselves embarrassed by the lack of arms and munitions and by the means of producing them in sufficient quantities for the purposes of national defense.<sup>39</sup> As Westlake has aptly observed, "the manifest tendency of all rules which interfere with a belligerent's power to recruit his resources in the markets of the world is to give the victory in war to the belligerent who is best prepared at the outset; therefore, to make it necessary for states to be in a constant condition of preparation for war; therefore, to make war more probable."<sup>40</sup>

<sup>38</sup>Compare the remarks of William C. Dennis, Esq., in the *Annals of the American Academy of Political and Social Science*, July, 1915, p. 173.

<sup>39</sup>This danger is emphasized by Secretary Lansing in his note of June 29, 1915, to the Austro-Hungarian Government.

<sup>40</sup>Collected Papers, pp. 391-392. Compare also the remarks of Wm. C. Dennis, Esq., in the *Annals of the American Academy of Political and Social Science*, July, 1915, p. 175, and a letter of ex-president Taft of January 24, 1916, to E. Von Mach. Dr. C. N. Gregory, in a recent article published in the *Outlook* (1915, p. 520), calls attention to a report that at the outbreak of the present European War an important European Power found on taking account of its stock that it had only six rounds of ammunition per capita for its armed forces. Had it been compelled to enter the war and had it been deprived of purchasing ammunition in foreign markets, its plight would have been pitiable.

The tendency if not the effect of such a rule would be to compel non-military nations which devote their wealth and energies to the peaceful industrial arts, to direct their resources and activities to the manufacture of munitions of war and the upbuilding of military and naval armaments. Such a policy instead of diminishing the eventualities of war would on the contrary probably multiply certain influences which promote wars, unless the manufacture of arms and munitions were made a government monopoly.

The attacks that have recently been made upon the existing rule, so long approved by the jurists and text writers of all countries and so generally followed in practice by states, have, as is well known, been made not in the interest of neutrality but in the interest of a particular belligerent. The purpose of the proposed alteration of the rule was not to maintain equality of treatment to all belligerents, but to nullify the advantage which one of them has won through its superior naval strength. Nowhere has the case against the proposed alteration of the existing rule been more cogently summarized than in Secretary Lansing's note of August 12, 1915, in reply to the Austro-Hungarian protest, where he said:

The principles of international law, the practice of nations, the national safety of the United States and other nations without great military and naval establishments, the prevention of increased armies and navies, the adoption of peaceful methods for the adjustment of international differences, and, finally, neutrality itself are opposed to the prohibition by a neutral nation of the exportation of arms, ammunition or other munitions of war to belligerent Powers, during the progress of the war.

The CHAIRMAN. As several have come in since the opening of the session, I will repeat that the subject for discussion is the relation of the exportation of arms and munitions of war to the rights and obligations of neutrals. As was intimated in Dr. Garner's paper, there is a wide difference of opinion upon the subject. He admitted that there were a million people who had indicated some difference of opinion upon that matter. The discussion will be continued by Dr. Philip Marshall Brown, Professor of International Law and Diplomacy in Princeton University.

## MUNITIONS AND NEUTRALITY

ADDRESS OF PHILIP MARSHALL BROWN,  
*Professor of International Law and Diplomacy in Princeton  
 University*

In the course of the memorable debate concerning neutral rights and duties before the Geneva Arbitration Tribunal in 1871, the United States argued that England "was the arsenal of the insurgents (Confederates), from whence they drew their munitions of war, their arms, and their supplies." The argument continues as follows:

It is true that it has been said, and again may be said, that it was no infraction of the law of nations to furnish supplies. But while it is not maintained that belligerents may infringe upon the rights which neutrals have to manufacture and deal in such military supplies in the ordinary course of commerce, it is asserted with confidence that a neutral ought not to permit a belligerent to use the neutral soil as the main if not the only base of its military supplies, during a long and bloody contest, as the soil of Great Britain was used by the insurgents.

It will be recalled that during the Franco-Prussian War Prussia complained through its Minister to England, Count von Bernstorff, "because the English Government authorized the wholesale forwarding of arms to France, and thus practised a neutrality, not of a benevolent character, but of a character prejudicial to the interests of Germany, although Germany waged the war for a cause which England herself should consider as just." Count von Bernstorff further stated that "the benevolent maintenance of neutrality which Germany might legitimately claim, should have for result the prohibition by England of the exportation of arms, since, under the circumstances, this exportation had the effect of favoring exclusively an unjust aggressor."

We now have another Count von Bernstorff (son of the Prussian Minister to England) in the midst of a war of tremendous significance presenting on behalf of Germany a similar argument, though curiously enough, there is no attempt to persuade the United States of the justice of Germany's cause. This argument runs as follows:

In the present war all nations having a war material industry worth mentioning are either involved in the war themselves or

are engaged in perfecting their own armaments, and have therefore laid an embargo against the exportation of war material. The United States is accordingly the only neutral country in a position to furnish war materials. The conception of neutrality is thereby given a new purport, independently of the formal question of hitherto existing law. In contradiction thereto, the United States is building up a powerful arms industry in the broadest sense, the existing plants not only being worked but enlarged by all available means, and new ones built. \* \* \* This industry is actually delivering goods only to the enemies of Germany. The theoretical willingness to supply Germany, also, if shipments thither were possible, does not alter the case. If it is the will of the American people that there shall be a true neutrality, the United States will find means of preventing this one-sided supplying of arms. \* \* \*

In view of the clear and entirely convincing manner in which the United States has demonstrated the technical right of neutral merchants to sell munitions of war to belligerents, notably in Secretary Lansing's forceful reply of August 12, 1915, to representations of the Austro-Hungarian Government on this subject, there would seem to be no need of further argument. The technical rights of neutral merchants to engage in this commerce are not questioned, as admitted by Germany in the statement that "The German Government have not in consequence made any charge of a formal breach of neutrality."

The serious question raised is of much wider import. As Germany well says: "It is necessary to take into consideration not only the formal aspect of the case, but also the spirit in which the neutrality is carried out." We are bound to re-examine in a critical spirit the whole problem of neutrality, its fundamental basis, its exact nature, its alleged rights and obligations.

The supplying of munitions of war on a large scale to belligerents vividly suggests some of the extraordinary inconsistencies, the preposterous anomalies involved in any attempt to remain strictly neutral in a great world-war.

Among these anomalies is the fact that while it is generally conceded that a neutral nation may permit private trade in munitions, it is not permissible to sell ships of war. The distinction between arms and ships, the one for ultimate use, the other for proximate use in warfare, is somewhat too refined for ordinary commonsense forms of reasoning, or for what has been well termed "the rough jurisprudence of nations." So likewise is the distinction which permits

the exportation of military aeroplanes, or submarines in parts, though forbidding the sale of vessels ultimately destined for warlike use.

Another extraordinary phase of this question is the difficulty of defining munitions of war. As a matter of fact they are not merely arms and ammunition, ships and cannon. As Lorimer truly says: "They are what war demands, whether it is shot and shell, shoes and stockings. \* \* \* All objects are munitions of war if a belligerent is in want of them; and no objects are munitions of war unless, or until, he is in want of them. Salt-beef and saltpetre are precisely on the same footing in this respect; and steel bayonets may be a superfluity where steel pens are a desideratum." It should be evident that any attempt to rigidly classify contraband of war as absolute or conditional is bound inevitably to fail, and worse still, to create needless confusion. If provisions are more urgently required than arms to enable a belligerent to hold out and finally win, a neutral nation must naturally render a greater service by permitting such peaceful traffic than by the sale of ships and guns. The logic of such a situation would impose either a complete prohibition of trade between neutrals and belligerents, or no restrictions whatever.

Consider the matter of enlistment. A neutral is bound not to allow belligerents to open recruiting agencies on its territory, but it is not bound to prevent its citizens from giving their services in various capacities to the belligerents. A neutral citizen may contract to provide arms and ammunitions, but may not contract to give his own services as a soldier, or engage the services of others.

Take, again, the question of loans, the supplying of the "sinews of war." They may be made publicly by belligerents on neutral soil; but public subscriptions and collections in their behalf are unneutral! Though a public loan may enable a hard-pressed belligerent to continue the war to a successful conclusion, it is quite an innocent commercial transaction, while the subscription is an unneutral service!

In all these ways it is permissible for neutral countries to serve as the base of supplies, the "arsenal," the treasure house of money and men, without being technically what Hübner calls either "a party or a judge" in respect to the belligerents.

But there are other anomalous aspects of this weird thing called neutrality. If a neutral nation may permit all these acts, it is still liable to serious interference on the part of belligerents. For example, neutral merchants may engage with impunity in the trade of

munitions with a belligerent if their nation is contiguous to his territory. Such trade, however, may be effectively prevented, the contraband confiscated, the vessel itself condemned, if found on the high seas. Moreover, while theoretically the neutral nation may claim the right to trade freely with the belligerents, it must be prepared to acquiesce in the right of belligerents to institute complete blockades of ports, coasts, or, as would now appear to be the case, in the blockade of an entire nation, the establishment of a stupendous siege.

When one considers dispassionately all these anomalies, these incongruities, these absurdities, even, of neutrality, he is constrained to challenge the very basis and nature of that abnormal institution, and to ask whether in a war of far-reaching effect and significance it is possible for any self-respecting nation to maintain a perfect neutrality or remain truly neutral.

The definition of neutrality as "a continuance of a state of peace" between neutrals and belligerents is obviously false in view of the many restrictions which neutrals are bound to permit, as well as the trying obligations they are bound to fulfill.

Neutrality is by no means a normal state of affairs. It is essentially an abnormal relation based on a hideously abnormal state of affairs. War is the negation of law: *inter arma silent leges*. Litigation by force of arms, international disorder, the general disorganization of the community of nations—all this of necessity places belligerents and neutrals in an entirely abnormal situation. As Lorimer soundly observes: "It is necessity alone which can justify either war or neutrality, and necessity is not a source of normal rights and duties."

War and neutrality being essentially abnormal in character, the next fact to be observed is the inevitability of a clash between the interests of belligerents and neutrals. When nations are impelled to stake everything on the battlefield, to make the uttermost sacrifice, they must perforce look upon the interests of indifferent neutrals as of relative unimportance. Prudence, the military exigencies of the situation, as well as a decent consideration for others and for the rights of humanity, will naturally restrain belligerents from interfering as far as possible with neutral nations. But the brute fact still remains that the interests of neutrals, when they clash with the pressing necessities of belligerents in the throes of a tragic struggle, sink into relative insignificance. It may be truly asserted under such a state of affairs that "*la force prime le droit*."

It is for these reasons that it is a thankless task to attempt to define the positive rights of neutrals. They are largely negative in character, varying with the nature of the contest. They are in the main such as the belligerents may choose to concede according to the issues at stake. This is why such a question as the use of submarines is necessarily surrounded with so much uncertainty. This is why it was found necessary to organize the Armed Neutralities of 1780 and 1800 in defence of the alleged rights of neutrals.

The United States had ample opportunity during the Napoleonic Wars to learn that the rôle of a neutral is exceedingly difficult. It will be recalled how England and Napoleon deliberately waged war on each other through neutrals; how skillfully Napoleon maneuvered the United States into war with Great Britain, when, as a matter of fact, with as much reason and better justification we might have gone to war with her enemies.

And now history is repeating itself in a most remarkable manner. The United States finds itself directly and seriously affected by a war of greater magnitude and significance. Its interests are being interfered with by both sides, while one of the belligerents, in imitation of Napoleon's tactics, is avowedly employing drastic measures of retaliation affecting neutral interests in the hope that pressure may be brought to bear on the other belligerent to modify its methods of warfare. The United States is thus again made to realize that neutrals must in some instances either endure considerable interference with their interests or else fight. The maintenance of neutrality under such conditions becomes increasingly difficult or well-nigh impossible.

Thus far we have been mainly considering the rights of neutrals: it is necessary also to bear in mind their obligations.

The general obligation of a neutral is usually defined as non-participation in the contest. It must not allow its territory to be used as a base of operations,—the improper use of wireless, for example,—nor permit any kind of act which would indicate partiality. A fictitious impartiality which, under the guise of affording equal opportunities to all, really affords special facilities for the only side able to avail itself of the chance, as, for example, the use of French territorial waters by the Russian fleet during the Russo-Japanese War, is obviously not neutrality. The "benevolent" neutrality which Prussia claimed from England in the Franco-Prussian War, though countenanced in principle by Grotius, is plainly a euphonism for unneutral neutrality.

Anything which renders a neutral nation of special value to a belligerent, particularly as a base of supplies, as an "arsenal"—to employ the term used by the United States in the Geneva Arbitration,—is calculated to make it hated by the other belligerent. In other words, that nation which desires to remain neutral may find not only that its alleged rights are seriously violated, but that it is placed under an obligation of impossible vigilance to avoid appearing either as the "benevolent" neutral or the open partisan.

There are those who virtually ask, as does Germany in respect to the sale of munitions, that a neutral nation should alter its procedure and laws so as to redress the balance upset by the varying fortunes of war. This is asking the impossible. It was for this reason that the preamble of the Hague Convention of 1907 concerning the rights and duties of neutral Powers in naval war contained the provision that "These rules should not in principle be altered, in the course of the war, by a neutral Power, except in a case where experience has shown the necessity for such change for the protection of the rights of that Power."

Taking into account the basis and the nature of neutrality, and the extraordinary difficulties in the way of its effective maintenance, it would appear that the nation which desires to insist on a free exercise of neutral privileges virtually finds itself reduced to the following alternatives.

1. Having no concern with regard to the issues of the war, it would trade indifferently with both sides, thus aiding them to prolong the fight at its own profit. It can not serve effectively to end the contest. As Lorimer pertinently remarks it "can not strike up the swords of the combatants by putting swords into their hands, money into their pockets, or food into their bellies."

2. By reason of the ability of one belligerent to control the seas, the neutral nation must find itself reduced to the rôle of supplying only one of the belligerents. Whatever it supplies, whether guns, food, or money, if greatly needed by the belligerent, will necessarily be of the nature of munitions of war. Under such circumstances it will not be strange if the other belligerent quotes approvingly the words of Demosthenes: "That person whoever he be, who prepares and provides the means of my destruction, he makes war upon me, though he have never cast a javelin or drawn a bow against me."

3. If the neutral nation finds that its interests and sympathies are

on the side of the belligerent which through the fortunes of war has lost control of the seas, it may find itself in the extraordinary situation of becoming the main support of the very side it desires to see defeated.

4. If, however, its interests and sympathies are with the belligerent which controls the seas, the neutral nation may prefer to permit that side to place restrictions of perhaps a severe and unprecedented character even, on its commercial intercourse with the other belligerent. In this case, if it tolerates, under the thin guise of a benevolent neutrality, technical violations of neutral privileges, it lays itself open to bitter and vigorous protests by the other belligerent against its patent failure to preserve strictly the impartial attitude of a true neutral.

Such, in brief, are the embarrassing alternatives which confront a neutral in its efforts to preserve neutrality in the face of a world-wide war vitally affecting its own interests as well as those of the belligerents.

It would seem clear, therefore, in whatever light one regards neutrality, whether from the point of view of the rights of neutrals or of the obligations of neutrals, that during a war of great proportions and significance a neutral nation must necessarily find itself in a most trying position. It can not possibly escape some of the direct, as well as the incidental hardships of war. When the family of nations is thrown into chaos, all its members must suffer in varying degree.

Under such circumstances, it must again be emphasized, a neutral nation may find itself goaded by its immediate or ultimate best interests to take up arms. It must make certain, however, that it fights for interests of general and fundamental importance, not for technical rights of a temporary, or possibly, doubtful significance. As a responsible member of the family of nations the neutral must be sure it does not follow a policy of unenlightened self-interest or shirk its duty to seek international justice and order. It can not do this merely by a passive attitude of neutrality. It "can not strike up the swords of the combatants by putting swords into their hands."

It would seem clear that under modern conditions of easy intercommunication, of the intimate interdependence of nations, no great nation can affect a selfish indifference to the interests of other nations, whether in times of peace or times of war. The breakdown of international order must vitally affect every nation. The existence of international injustice, threats of aggression, lust for territory, ambitions

to restrict the freedom of others, contempt for the basic principles of international law: all this must arouse any self-respecting nation from a state of callous indifference. The issues of a great war are of too deep insignificance for the cause of international order and world peace to permit of real neutrality. Westlake would seem to be right when he says:

There is no general duty of maintaining the condition of neutrality. On the contrary, the general duty of every member of society is to promote justice within it, and peace only on the footing of justice, such being the peace which alone is of much value or likely to be durable. \* \* \* We may sum up by saying that neutrality is not morally justifiable unless intervention in the war is unlikely to promote justice, or could do so only at a ruinous cost to the neutral.

The conclusions of Lorimer deserve to be quoted at length:

When a question has arisen between two states, and, above all, when that question has led to war, the object of international law is, not to ignore the war, but to remove the cause which has led to it; and this involves giving to the question, not the cheapest and speediest, but the most exhaustive, and, as such, the most permanent solution. There may be cases in which that object may be, or may seem to be, attainable by neutrality or by intervention, indifferently; and in such cases an option between these two courses will, no doubt, be jurally open to the state which is unable to decide between them. But such cases must always be rare; and the acknowledged interdependence of states in our own time tends to render them rarer and rarer. It is the growing sense of their rarity, indeed, that is the progressive element in international morality upon which our hopes for the progress of international law depend.

Of the strength of this element, the European Concert, even as it now exists (1884) and our proposals for the adoption of international arbitration on a wider scale and a more organized system than any hitherto known to diplomacy, are prominent manifestations. International organization, developed to the extent of enabling tribunals to enforce their own decrees, is the aspiration of a still more advanced school of internationalists. Is it not manifest that these are all but varied forms of intervention, and that in every direction it is to intervention that the very individuals who talk most of neutrality and non-intervention really direct their hopes? "Charity begins at home," and the real interests of his own country must always be the first consideration of the states-

man; but to identify a policy of neutrality with the interests of international peace is one of the strangest hallucinations that ever took possession of clear-headed men.

Holding views of this character, it is not strange that Lorimer should find only two grounds of justification for a nation's remaining neutral: (1) "Involuntary ignorance, or intellectual and consequent moral inability to participate in belligerency"; (2) "Impotence or physical inability to participate in war."

It would seem as if Lorimer's statements were somewhat too sweeping, and fail to take into account localized wars between remote nations not intimately connected with other members of the family of nations,—Bolivia and Peru, for example. The neutrality of Sweden in such a case would be fully justified. But on the whole it still remains true that there is an increasing realization of the interdependence of nations which renders their misfortunes and struggles of deep concern to each other. A remarkable manifestation of this tendency is the proposed League to Enforce Peace. Viewed either as a kind of international executive or as a disguised form of alliance, this League is a bold enunciation of the duty of intervention to preserve peace. It is a frank abandonment of the idea of neutrality. It is an admission of the truth of Westlake's assertion that there is no duty of neutrality. It is a recognition of the fact that neutrality is usually humiliating and ignominious.

By way of summary, then, in view of the foregoing considerations suggested by the question of the exportation of munitions of war, we would seem led to the following conclusions:

I. Neutrality, like war itself, is entirely abnormal. It is based on necessity, which, as Lorimer points out, "is not a source of normal rights and duties."

II. Belligerent interests take precedence over neutral interests. If a nation tries to remain neutral it finds it must suffer many restrictions and infringements of the rights of peace.

III. It is impossible for a neutral in the varying fortunes of a war to remain the friends of both belligerents. It can not alter its course according to the course of the contest. It can not preserve a perfect neutrality. It can not observe a "benevolent" neutrality and remain truly neutral.

IV. If a neutral does not wish to remain in a humiliating, ig-

nominous position it must be prepared to fight in behalf of its own best interests.

V. If a neutral nation chooses to fight, it must be certain that it fights on the side of international order and justice.

VI. It is the positive duty of a nation as a member of the family of nations actively to assist in the maintenance of international order and justice. A neutral nation must necessarily become both a judge and a party in a world-war. Its own best interests require that it should make certain that such a war ends to the advantage of the whole community of nations. Mediation, abstention from intervention, indifferent neutrality, are of slight value or of no value at all. The self-respecting nation, capable of vision and of sacrifice and willing to play its part as a world-power will not shrink from the cost and the dangers of intervention. Ignominious neutrality will be treated with just contempt as the refuge of a timid, selfish people, faithless to their duty as responsible members of the great community of nations.

The CHAIRMAN. The opportunity for discussion is now before the meeting.

Professor JOHN H. LATANÉ. Mr. Chairman, I think for the purposes of this discussion, as stated on the program, we must assume that there is such a thing as neutrality. We can hardly, therefore, adopt the conclusions announced by the last speaker. If we are simply going to predicate the impossibility of neutrality and hold that there is no use trying to maintain it, then we have nothing to discuss this morning, that is, at least on the subjects outlined on the program. I have, therefore, to differ with him on several points.

Professor Garner has shown, I think very conclusively, that the right to export arms and munitions is upheld by the authority of the overwhelming majority of writers and publicists, that it is also upheld by the practice of states, that it is upheld by two recent conventions signed by all the important Powers, and that it is upheld by national interests, certainly by the interests of the United States owing to the fact, as has been frequently pointed out, that we do not keep on hand a large supply of arms and munitions and that we occupy a certain geographical position of advantage which we should not sacrifice. It is very unlikely that the United States would ever have its vast coast lines so blockaded that we could not secure arms

and munitions abroad and, therefore, it would be bad policy on our part to sacrifice that natural advantage by agreeing in the future to any rule which would prohibit the purchase of arms and munitions from neutrals. The Austrian note, it will be recalled, raised the question as to whether the remarkable creation of this industry of the manufacture of arms and munitions since the beginning of the war did not really invalidate the argument on grounds of American policy as advanced by the Secretary of State.

It seems to me that the attitude of most Powers in recent years on the whole question of contraband is pertinent to a discussion of this question. The enlargement of the contraband list is to my mind the strongest argument against prohibiting the contraband trade. Professor Garner has shown that you can not draw a distinction between different classes of contraband. The proposal has been made to stop the trade in arms and munitions, but chemistry enters into modern warfare to such an extent that it is almost impossible to say with sureness that anything that you ship abroad may not be used directly for military purposes. Someone has recently called attention to the fact that under the present interpretation of the rules England would be fully justified in holding up a cargo of tooth powder and subjecting it to chemical analysis because certain kinds of tooth powder contain chemicals that would be of direct military use to Germany, and that England would be justified in stopping the shipment of canned milk because the cans can be used by the Germans as hand grenades. So that it is practically impossible to draw any line of division.

In view of the enlargement of the contraband list on the part of belligerents, neutrals can not be expected to agree to a limitation of the contraband trade. Von Bar, quoted by Professor Garner, in a very striking way, says, "True progress consists, not in prohibiting the contraband goods, but rather in abolishing the right to interfere with such trade except through the exercise of the right of blockade."

Germany's protest at first did not question the legal right, but suggested that the United States could use the situation in order to bring about a better state of trade in articles not contraband of war. The later Austrian note, however, while admitting that we were following the text of the Hague Conventions, claimed that the majority of writers on international law were opposed to the contraband trade when it assumed such large proportions, and appealed to the changed situation and the morality of the case.

Now, I agree with Professor Brown, that if a belligerent is going to appeal in discussions with a neutral to the morality of the trade as distinguished from its technical legality, then it is up to the neutral to consider the question of the morality of the war. But I do not believe the belligerent has any right to appeal simply to the morality of the case, because the laws of neutrality have been fairly well-defined, and while in an individual case the law may not seem to work justice, in the long run it does.

Mr. WILLIAM B. GUTHRIE. Mr. Chairman, I presume the one thing that we all agree to is the difficult position in which the United States finds itself because of being practically the only neutral to supply munitions of war, although I suppose that owing to the fact that Japan, as I understand it, legally is not involved in the war in Europe, the supply of arms by Japan would also be a supply of arms to the Allies from a neutral country. I would suppose that that would be a sound statement of the case.

I was talking the other day with Miss Mabel Boardman, and in the course of the conversation I asked her what she considered to be the hardest problem in dispensing aid in Europe. She said it was the difficulty of remaining neutral. When heads of organizations like the Red Cross say that a hard thing to do is to remain neutral in dispensing the mercies of the country to those who are at war, it is certainly a difficult thing for a country to be kept neutral when it is dispensing military supplies and war requisites.

I presume that before the subject is entirely discussed we will have to meet the Austrian note demanding that a distinction be made between impartiality and neutrality, because in discussing a thing of this kind you have to meet the other man's opinions just as well as your own. Austria claims that the reason why she can not utilize our munition plants is the fact that England is enforcing a blockade illegally. That is the Austrian opinion, and we will have to meet it if we are going to convince them and possibly ourselves. That subject, I believe, is up for discussion. The very fact that you have a topic here to be discussed involving the question of the legality of the war zones, admits a part of Austria's point, namely, that there is an illegal war zone established; hence, that there is a blockade established on account of which the Central Powers in Europe can not utilize our munition plants. If you admit that there is a certain discussion

concerning impartiality and what a war zone shall be and what it shall not be, you admit the possibility that there is an illegal blockade of Germany. Hence the shutting off of the Central Powers from war requisites is not due to geographical position; it is due to the misuse or to a violation of a principle of international law which is not yet settled, whereby the Central Powers are excluded from our munition plants. I think the fact that you are going to discuss that question admits Austria's contention that the Central Powers are excluded from the American sources of the requisites of war because England is carrying on an illegal blockade of the Central Powers.

I think Austria in her note has made a very strong point in that one matter. I think also that the Austrian note is worthy of very serious consideration on the ground of excessive supply. Professor Garner has pointed out—and I think we agree with him probably in the large—that it is difficult to establish a difference in the nature of a thing because of a difference of degree, although in many instances a difference of degree makes a difference in nature. To take just one item—copper; the United States produces fifty-five per cent of all the copper in the world; Germany two and one-half per cent, England two-tenths of one per cent, and France none. Assume that Germany had not provided herself with 25,000,000 rifles and 50 billion rounds of munitions; assume that she had gone on the proposition of unpreparedness, as has the United States, on the whole subject of copper. Or, take manganese, 85 per cent of which is produced by Russia and the United States. Assume that the Central Powers had not provided themselves with these things. Would it not be a case of admitting that, if the United States supplied copper or other things to such an extent that they became the absolute dominating force in the struggle, you would have to reach a point where the quantity of things you manufacture was so great that it made a difference in the nature of the things?

The third point that was made by the Austrian note is that we have gone into the business, having built up industries at a tremendous rate, which is rather encouraging to persons who are a little afraid of non-preparedness. The purpose of the construction of the plants, however, is shown by the fact that the standard of the people who are actually supplying the arms is neither a standard of morals nor of neutrality. The criterion that these people who are supplying arms and munitions are acting upon, separated from the criterion that you and I and other

persons are applying, is simply the criterion of the business world, which always is impartial. The business world does not care where it gets its profits.

I was talking with a business man in New York and he said, "One man who was working for me has quit, and the family, made up of six persons, are now bringing home \$150 a week. The lowest amount, that received by one of the girls, is \$23 a week. They are working in munition plants." Obviously, the criterion they are applying to this business is neither one of morality nor neutrality. It is simply a part of the hardheaded business of the world. The owners of big corporations do not know where their money is. But they are clipping their coupons, and the family that is working for the munition plant is taking home its \$150 a week. Their standard as to right or wrong is their financial gains. They are not testing it by a standard of morality or a standard of neutrality. So you might solve the whole question by carrying through Senator Cummins' proposition of last January, namely, that the government take over everything that is obviously contraband, as England did on the 17th day of August of last year in commandeering three hundred or four hundred plants. We will be met by the difficulty of deciding what is actually contraband and what is not, but it at least would include all of those articles about which there is no question. It would put those things out of the discussion because the government could not trade in them and it would narrow the discussion to what may and what may not be set down as contraband which always will, of course, lie in the shady field of discussion.

Mr. CHARLES NOBLE GREGORY. Mr. Chairman and ladies and gentlemen: I want to suggest a point of view that somewhat conflicts with the suggestions of the gentleman who has just taken his seat as to the Austrian note. The suggestion was made that the validity of the declaration of some sort of a war zone was supported by the fact that we are to discuss the validity of such a zone. I would venture to differ with that conclusion. The fact that we discuss here the validity of the declaration of a war zone seems to me strong evidence that some of us have doubts.

Then I want to call attention to the fact that the declaration of a war zone seems hardly necessary to enable the ships of the Allies to seize contraband, because without any war zone and without any block-

ade they can seize contraband bound for their enemy anywhere on the face of the ocean. Therefore, the declaration of a war zone and the declaration of a blockade which may be deemed unlawful has nothing to do, under international law as absolutely settled, with the seizure of contraband anywhere on the seven seas.

Now, gentlemen, I do not rise only to discuss a question of law. I rise to discuss a question of policy and a question of policy which lies at the root, in my judgment, of the morality of our trade in warlike supplies. I venture to submit that it is of prime importance to the safety of peaceful and prosperous nations like our own that the free export of munitions of war in time of war from neutral countries to either belligerent should be permitted. The reason is simply this: that an aggressive nation prepares for war. A thug has his weapon up his sleeve or in his pocket and an honest man walks unarmed by night and by day. Now, if the honest man is helpless when he is assailed, if he can get aid from nowhere, no matter what his credit or what his fortune, and he must fight with his unarmed hands when he is assailed by a prepared enemy, then you endanger peace, you do not protect it. A rule which would prevent in case of war a peaceful nation, an unprepared nation like our own, but a rich nation like our own, from buying any munitions of war in any market but her own would make the peaceful nation the prey of the marauding nations. Therefore, gentlemen, on grounds of the broadest morality, of safety for ourselves and all like ourselves desirous of leading a peaceful and a beneficent existence; on the ground that that broad policy protects the rule which we have always practiced, which every great manufacturing country in the world has always practiced, which our statesmen from the time of Washington down to the present time have affirmed, which our courts have affirmed, which our lawyers have affirmed, which was solemnly agreed to by all the civilized nations of the world nine years ago after discussion at The Hague and which was solemnly ratified by both Germany and Austria after the action was there taken, at the instance very largely of Germany, who had been the greatest exporter of munitions of war in the world; I insist, very earnestly, that the doctrine advanced by the Government of the United States and the practice followed by the people of the United States at the present time is, *in the highest degree, legal and expedient and moral.*

Mr. FREDERIC R. COUDERT. I concur in everything that the last speaker said, and there was something that came to my mind which may throw some light upon his point of view, which I believe to be the correct American point of view. I met a manufacturer in the earlier days of the war, one of our largest arms manufacturers and a man who had been at the head and was still at the head of one of our large concerns. I said, "I suppose this will be a profitable business for you in your plant." He said, "We have to make a plant; we have no plant." I said, "I supposed you had a plant." He said, "We do not make rifles any more. We had to go almost entirely out of that business; it was unprofitable." I said, "Why?" He said, "The competition of the German manufacturers was such that it was useless for us to stay in. They would always underbid us on contracts, the idea being that they must get the contracts the whole world over. That kind of competition, with a great Power of Europe back of it, was unbeatable, and we have given up the manufacture of arms and for two or three years now have manufactured little except American goods for sporting consumption. So if we go into the business now we shall have to build our plants." There was a statement of fact by a hard-headed business man, from which it is perfectly easy to deduce the whole able policy of Cæsarism. A nation that has the arms monopoly throughout the world holds the destiny and the politics of the world in its hands.

Professor THEODORE P. ION. I quite agree with what Professor Garner has said. I should like only to discuss two points mentioned by Mr. Guthrie. One point was impartiality. International impartiality does not mean that a neutral must see that both belligerents receive the same advantages. As long as such neutral places at the disposal of both belligerents the same facilities, there is impartiality. It is immaterial whether both parties can profit by such facilities. During the South African war, Portugal was accused of partiality because she had allowed Great Britain to send troops across Portuguese territory. Strictly speaking, Portugal had no right to grant Great Britain such facility, but Portugal did so on account of a treaty obligation. She had been an ally of England for centuries, and is in the present war. Of course, the other belligerents had the right to declare war on Portugal on account of her partiality. In the present case the United States is not obliged to deprive Great Britain, France

or Russia of their right to trade in munitions of war, because the other belligerents can not have access to the United States ports. That is the first point.

The second point raised by the gentleman related to blockades, namely, the so-called illegal blockade of the German coast. The rule of blockades, which had been originally laid down in the Treaty of Paris of 1856, is that a blockade, in order to be binding upon neutrals, must be effective. The word "neutral" is not mentioned in the treaty, but anybody who has studied diplomacy or international law knows that the rules of blockade have been laid down in the interest of neutrals and not in that of belligerents. Therefore, if the blockade of Germany by Great Britain or France is illegal, that only concerns the neutrals and not the belligerents.

Mr. GUTHRIE. I did not rise to discuss the question of impartiality, but to discuss the Austrian view of it as disclosed in her notes. If the United States should take advantage of and hide behind the proposition that she is entirely impartial because she has opened her ports and her munition plants to everybody, I will claim then that the United States is *particeps criminis* to a procedure against which Austria and the Central Powers had a perfect right to protest.

Mr. CHARLES S. BRAND. I thoroughly agree with the remarks made by Professor Gregory. The right to trade in war munitions has always been exercised by the very Power which today claims indulgence. The German people sympathized with the Boers in their contest with England. We all know that. But that did not prevent the German manufacturers of munitions from selling their goods eagerly, gladly and willingly to England. There was no blockade of the Boers, that is, not such a blockade as exists against Germany; but that little country was hemmed in by a natural blockade, and yet Germany is now protesting against the wholesale selling of munitions to one of the belligerents because, forsooth, it has not the control of the seas sufficiently in order to get its share. Such a situation did not prevent Germany in the Boer War from selling munitions to England in a war which it thought was unholy.

The CHAIRMAN. Is there any further discussion?

Mr. CHAUNCEY D. BREWER. Mr. Chairman, I would like to make one suggestion. If I am right, neutral nations are in the position of

sovereignties exercising their normal rights. Now, if that is correct and these neutral nations, or these sovereignties, are trading here, there and everywhere, and in the event of war they are asked by one side, by one belligerent, to stop their regular intercourse and do so, it is an act of war as far as the other belligerent is concerned.

The CHAIRMAN. Is there any further discussion upon the subject now before the meeting? If not, we will stand adjourned until 2:30 o'clock this afternoon. The subject for discussion this afternoon will be the conduct of submarines in time of war.

(A recess was thereupon taken until 2:30 o'clock p.m.)

### THIRD SESSION

Friday, April 28, 1916, at 2:30 o'clock p.m.

The meeting was called to order at 2:30 o'clock p.m., by Professor  
GEORGE G. WILSON.

The CHAIRMAN. Gentlemen, the topic of the afternoon relates to the rules of law which should govern the conduct of submarines with reference to enemy and neutral merchant vessels and the conduct of such vessels toward submarines. The discussion will be opened by a paper by Mr. Raleigh C. Minor, Professor of International Law in the University of Virginia.

#### THE RULES OF LAW WHICH SHOULD GOVERN THE CONDUCT OF SUBMARINES WITH REFERENCE TO ENEMY AND NEUTRAL MERCHANT VESSELS AND THE CONDUCT OF SUCH VESSELS TOWARD SUBMARINES.

ADDRESS OF RALEIGH C. MINOR,

*Professor of International Law in the University of Virginia*

Not the least difficult of the questions that will clamor for solution after the European War will be the amendments to the laws of war rendered necessary by the invention of new weapons or the unimagined use of instruments originally devised for other purposes.

The great struggle has witnessed the introduction into warfare of many new instrumentalities of transportation, of the scout, of the attack and the defense. Great strategic lines of railway, the automobile, the motorcycle, the motor boat, the wireless, have almost annihilated distance; the aeroplane and airship have, for scouting purposes, relegated the cavalry arm to the background, if not quite sealed its doom, and in addition have become familiar and fearful weapons of attack; jets of scorching flame and death dealing gases now sear and destroy the human units which might withstand the furious storm of shot and shell pouring from the guns of all calibres that lie thick as leaves that fall in Vallombrosa.

All these dread devices are being used by the belligerents, and doubt-

less are causing suffering incommensurate with the advantages gained by their use. When the war is over, and the eye of the expert soldier may calmly review the goals sought in particular instances, comparing the results of the methods used with those that might have been attained by less ruthless means, it will no doubt be found that needless cruelties have been practised, and an international conference will find ways to ameliorate these new evils as they have others in the past.

The task to which I have addressed myself, however, is more restricted in its scope. I am to deal as briefly as possible with the *post bellum* rules, if any, that should be incorporated into the laws of maritime warfare touching that new and dreaded monster of the deep,—the submarine; especially with reference to its treatment of, and by, enemy and neutral merchant vessels.

To obtain a clear conception of the problems involved, it will be well concisely to review, first, the principles of maritime warfare upon commerce recognized before the present war; second, the nature of the submarine, and those characteristics which differentiate it from all other war vessels; and third, the extent, if any, to which this differentiation should cause a corresponding modification in the existing rules of maritime warfare.

## I

Prior to this war, international law had not been confronted with the possibility of any belligerent ship attacking another except upon the surface of the water, under circumstances in which the attacking ship could be discerned at a considerable distance, its nationality determined before a shot might be fired, and its nature as a ship of war or a commercial vessel ascertained in time for the master of the threatened boat to decide upon measures of defense, escape or submission.

It was the recognized right of the master of a merchant vessel on the high seas in war time, whether the vessel belonged to a belligerent or a neutral nation, whenever he might see a suspicious smudge of smoke on the horizon, to select either of three alternatives. He might, first, seek to escape capture or visit and search by putting on all speed, and perhaps with the aid of friendly darkness evade the possible pursuer. Or, second, he might determine that attempt at escape or resistance would be useless, and that it was his duty to submit passively to the capture or the visit and search. Or, third, he might place himself in a posture of defense, and await the coming of the nearing

vessel. If, upon its closer approach, he should find it a strong war vessel, practical considerations would prevent him from attempting a battle with only the small calibred guns which he would be likely to carry for defensive purposes, which, however useful against attacks by ill-armed vessels like pirates, privateers, or converted passenger vessels, would avail nothing against the heavily armored and strongly armed cruiser or battleship.

Practical considerations, I say, would usually prevent such a conflict, but no rule of international law would have prohibited it, unless it be counted such a prohibition that the law would justify the war ship under such conditions in using all the force needful to subdue resistance (but no more), or that the law would permit such resistance, in the case of a *neutral* merchantman, to be penalized by the condemnation of the vessel itself. In case of an *enemy* merchant vessel, such condemnation would of course result, whether there was resistance or not.

On the other hand, the pursuing ship, instead of being a heavily armed battleship, might turn out to be a privateer or a lightly armed converted cruiser, so that conceivably the merchant vessel might have a chance of waging a successful combat, perhaps even of sinking the attacking vessel by some lucky shot.

But the proposition had never been advanced prior to the present war that a lightly armored war vessel would be justified in sinking or in any manner injuring a merchant ship, whether flying an enemy or a neutral flag, which as yet had shown no signs of resistance, merely because of the possibility that it might use defense guns, which might sink the war ship. The presumption was conclusive that the war vessel would be sufficiently strong to overcome and render useless any defense. If not, so much the worse for the attacking party. He was not permitted to make the merchantman's possible strength the excuse for a surprise attack.

Again, while the law recognized that conditions might arise in which it might be necessary to destroy an enemy prize, without bringing it and its cargo into port for condemnation, it was yet recognized that the decision of the prize court was the main reliance of the law to prevent illegal captures of ship or cargo, and to that decision the production of the ship's papers was essential, so that the practice of destroying even *enemy* ships was viewed with strong disfavor and sought to be confined to the narrowest possible limits. And especially to be

condemned 'was the destruction of the documentary evidence along with the ship. On the other hand, the destruction of *neutral* prizes has never received the sanction of international law.

The law also demanded inexorably that no prize should under any conditions be destroyed until crew and passengers had been placed in safety, unless the vessel were destroyed in fight or flight. Nor was any difficulty to be anticipated on this score, since there would always be accommodations of a sort for them aboard the attacking vessel. They need never be exposed in small boats to the perils of the sea.

This brief summary shows that the *ante bellum* system of international law, as it applied to the visit and search or the capture or destruction of merchant vessels, followed closely the lines dictated by humanity and justice. The attacking ship and its government was subjected in every case to a strict responsibility because its acts would all be done in the open, with the full knowledge of every person upon both vessels, and the legality of those acts would be tested under the scrutiny of a prize court.

## II

Our next inquiry must be whether the nature of the submarine is such as to permit it to fit into this *ante bellum* system of law, without unduly undermining its foundations. If not, then the use of such boats in future warfare on commerce can only be justified by showing that such use may be so regulated as not to violate the principles of law and humanity already established.

The submarine, as first devised, was intended as an instrument of attack upon war vessels and had before the present conflict, I believe, never been thought of by any expert in international law as a possible weapon of offence against commerce. Indeed, its very structure forbade such use of it under existing rules of law.

It could not carry enough men to furnish crews to take prizes into port, and hence would be compelled to destroy them all. At the same time it was too small to harbor any considerable number of refugees from a doomed vessel, so that passengers and crew would be obliged to seek safety in open boats upon rough and treacherous seas.

It must necessarily be lightly armored, and a small calibred gun might work its destruction. The guns carried by merchant vessels for defense purposes might easily sink it. Even a rifle bullet might destroy its periscope, without which it would not only be blind and useless for attack, but would be in serious danger of ultimate de-

struction. And when it is considered that under existing law a warship is not permitted to fire upon a merchantman except in fight or flight, but must await its attack, it is not surprising that no one versed in the principles of *ante bellum* international law imagined the possibility of submarine warfare on commerce.

Again, the submersible, at least as developed before this war, was not a fast boat even on the surface of the water, and could be outdistanced by many, if not most, merchant vessels. This would usually necessitate a secret approach under the water, so that upon making its appearance it would be so close as not easily to admit of its victim's escape. Thus, in many cases, a merchant ship which, if it had known of a war vessel's approach, might have succeeded in escaping, would be forced instead to stand and fight or else submit. And the temptation to resist would be the greater, since the submarine, not carrying heavy guns, must usually show itself within range of the merchantman's guns, enhancing the chances of destruction alike to itself and to the vessel pursued.

It is thus seen that, under the rules and theories of maritime capture as they existed before the war, the submarine was not adapted to warfare against merchant vessels.

Those rules demanded open warfare, with a corresponding responsibility for illegal conduct, and a superior strength on the part of the war vessel that must not exert itself in violence until actually attacked or until an attempt be made to flee. They demanded that *enemy* prizes, save in rare instances, and *neutral* prizes invariably, be brought into port, so that the legality of the capture both as to ship and cargo might be duly investigated by a prize court. And they particularly demanded that the safety of passengers and crew of captured vessels be in all cases provided for.

Submarine warfare on commerce fails to measure up to a single one of these standards. Its attacks are secret and by surprise, not open and public, so that it is difficult to fix responsibility upon the operators of such a boat should they desire to conceal the truth; instead of strength superior to its intended victim, it is in some respects more vulnerable; it can not with safety await an attack even from guns of small calibre, so that the temptation would always be strong not only to dispense with the important requirement of visit and search, but to attack and sink the merchantman without warning. Even if it resists this hideous temptation, it is obliged to destroy its prizes, since

it can not spare men from its small crew to run the prize into port for condemnation; and when it does destroy the prize, it has no means of assuring the safety of passengers and crew.

### III

Our next inquiry is whether changes may properly be made in existing rules which would relieve the submarine of the disabilities under which it now labors.

It has been suggested that a prohibition upon merchant vessels to arm for defense would cure the difficulty and would at once admit submersibles to a legal participation in warfare on commerce. But would it have this effect?

In the first place, it would deprive the mercantile marine of every nation in time of war of the now admitted right to defend itself not only against submarines, but also against privateers and auxiliary cruisers, however weakly they might be armed. A little motor boat with a single small gun might thus hold at its mercy the largest and most powerful merchant ships, playing havoc with neutral as well as enemy commerce. Surely it is not unreasonable to demand that, if a belligerent is to be permitted to put trade to a violent death, the real force behind the violence must be adequate to awe the victim into submission, and not such as merely to tempt to resistance.

Nor would the disarmament of merchantmen prevent the danger to the submarine that would result if its victim should seek to ram and sink it, for the submersible is as liable to destruction in that mode as by gunfire. Hence logically, the amendment of the law must extend to a prohibition of any attempt to ram the submarine as well as to a prohibition to carry guns.

But even this would not suffice. The danger to the submarine, upon approach, would be so great that it would be unreasonable to expect its commander to put entire faith in the good dispositions of his opponent. On the contrary, he would be suspicious of any movement that might indicate a hostile intent and, however mistaken in his belief, he would feel himself justified, and his country would justify him, in immediately sinking the suspected ship. Hence, besides prohibiting the carrying of guns and attempts to ram the submarine, our amendment should logically prohibit the merchant vessel also to engage in any suspicious movements whatever.

Into such absurdities are we betrayed when we desert the principle,

established by long experience, that the burden legally lies upon him who seeks to use force against non-combatants or inferior foes to possess the force necessary to overcome all resistance and to render it useless, as appears in the requirements that a blockade, to be valid, must be effective, that invaded territory can not be legally "occupied" by mere flying columns, and that in war upon savages there should be an opposing force sufficient to overawe resistance.

The proposed amendment would reverse this wise principle and, instead of demanding that for a legal use of force the attacker shall be so strong as to render resistance useless, would demand that upon the party attacked shall rest the duty of being so weak as to be incapable of resistance.

Even if these objections to the disarmament of commercial vessels be disregarded, we would be confronted with the principle of law that when a right is being legally exerted by force, no greater violence shall be used and no greater injury or destruction wrought than is essential to attain the desired goal.

War is destructive enough of world capital, even when conducted upon lines the most civilized, and it would be deplorable if the laws of war were altered in the direction of greater destructiveness. But if we admit this amendment and grant that the submarine may without danger to itself make prize of merchant vessels, we would be deliberately consigning every such prize and its cargo to destruction, since there is no means by which it might be carried into port and conserved as part of the world's capital. And when we remember that there can be no practical guarantee of the safety of the passengers and crew, the amendment stands still further condemned.

Should all these objections be in some way obviated, there would yet remain perhaps the greatest of all. It is none too easy, even under existing rules, to restrain belligerents, inflamed by the passions of war, within the limits that humanity and civilization demand. The adoption of the proposition to disarm merchantmen would make it easy for an unscrupulous adversary secretly to creep upon a defenseless victim and destroy it, without even giving such of the passengers or crew as might escape death the opportunity to know the cause of their disaster. No more deadly weapon for a treacherous belligerent could be devised. By means of it he might be guilty of any illegal attack he might choose to make, and yet leave in doubt the cause of the catastrophe.

If it be argued that a surface war vessel might be equally guilty of violations of humanity and the laws of war, it may be replied that the illegal attack would in such case be an open one, known at once to all concerned, and, through the wireless or the escape of persons on board the doomed vessel, there would be a chance that the disgraceful facts might become known to the world. This would serve as a very considerable check upon such illegal acts. Moreover it would usually be feasible for a surface vessel to bring the prize into port, in which event the captain of the war vessel would find it difficult to explain to his own government why he has permitted his passions so to overcome his judgment as to deprive his country, through an unnecessary destruction of the prize, of the pecuniary and commercial benefits of the capture.

Thus, while necessity and temptation might unite to induce submarines to destroy unarmed merchant ships without warning or excuse, both necessity and temptation would usually be wanting in the case of other war vessels.

These theoretical conclusions are fully sustained by the practice in the present war. There is no instance, I believe, in which a surface war vessel of any belligerent, meeting merchantmen, whether enemy or neutral, on the high seas has failed to obey the dictates of humanity in the capture. True such prizes have been destroyed, but only under circumstances of necessity, and never without removing passengers and crew to places of safety. On the other hand, the submarine warfare on commerce has presented a long list of attacks without warning, hundreds of innocent non-combatants and even neutrals being sent suddenly to their deaths, or, at the most, given time only to take to boats, with little concern whether they might find a watery grave.

In some cases neutral vessels have been blown up under circumstances that engendered grave suspicion of submarine activity, though responsibility therefor has never been acknowledged by any belligerent government, so that the injured nation, though neutral, has been left no alternative save to submit to the outrage for the want of positive proof.

If then the submarine can not be adapted to warfare on commerce through the disarming of merchant ships, the only other alternative would seem to be so to strengthen the submarine as to make it impervious to the defensive attack of a commercial vessel, as are other

warships; and at the same time by enlargement of the submersible itself or by some other device to enable it to bring in prizes and to guarantee the safety of persons on board. But these are questions of submarine construction, not of international law. Indeed, even though such improvements are in time perfected, there would yet remain the fatal objection that the submarine, through its power of secret approach and attack, possesses and furnishes to its government an immunity from responsibility, which it would be in the highest degree impolitic to concede.

To summarize the conclusions reached:

International law legalizes the use of armed force against merchant vessels, but only on certain conditions,—amongst others, (1) that the force brought to bear be reasonably adequate to overcome and render useless all resistance; (2) that the attack be an open one, for the legality of which the country to which the attacker belongs can be made to assume full responsibility; (3) that due precautions be taken for the safety of innocent non-combatants; and (4) that prizes be brought in for condemnation, and not destroyed save in rare instances, and only when the prize is enemy, not neutral.

As has been shown, the submarine, by reason of its very structure, is unable to meet any of these indispensable conditions. And not only are these conditions indispensable under existing rules of international law, but it would be impossible to modify them without violating some of the most fundamental principles upon which that law is based and taking backward steps toward pristine conditions of barbarism.

If then the question be asked, "What rules should govern the conduct of submarines in warfare upon commerce," the only possible answer would seem to be, "There must be *no* submarine warfare on commerce."

It would follow that a submarine ought to be prohibited to approach or pursue a merchant vessel, whether enemy or neutral, on the high seas, unless itself in distress or to relieve distress, in either of which cases its mission would protect it from attack. Under other circumstances its approach would lay its motives open to such suspicion as would justify an attack upon it by the merchantman in self-defense,—an attack which it would have brought upon itself and to which it would not be justified in replying.

It should be made the first duty of a submarine to remain at a safe distance from all alien commercial bottoms on the high seas, and any

belligerent act on its part against a merchantman, enemy or neutral, ought to raise a strong legal presumption of the criminal responsibility of the submarine's commander and his government.

The CHAIRMAN. The committee on program have left ample opportunity for discussion of these matters which are so much in our minds at the present time. The rule in regard to the discussion is that the informal discussions will be limited to ten minutes for each speaker. The question is now before the Society for discussion.

Professor JESSE S. REEVES. Mr. Chairman, with the conclusions of the speaker I am heartily in accord, and yet there are one or two considerations that I think ought to be borne in mind in connection with these conclusions. The first is a purely theoretical one, perhaps, as to whether or not the relations between belligerents are, after all, juristic relations. Of course, the law of war, both of maritime warfare and land warfare, plays a large part in all text-books on international law and did so before the time of Grotius. Nevertheless, when two countries are already at the extremities and have resorted to war, one can hardly conceive a juristic relation between the two. What restrains two belligerents, one with reference to the other? First, there are a great many things that shock the sensibilities and the conscience of people. Conceivably there are certain things that people would not do even if they had the legal right. I may be altogether prejudiced, but I must confess that I believe it would be quite outside the possibilities for an American submarine to sink, in time of war, an enemy *Lusitania*. I believe it would shock our sensibilities to such an extent that that would be considered as a restraining influence.

Another restraining influence is the fear of reprisals. But just as soon as we enter into the doctrine of reprisals we may be entering into the realm of legality. Enter the neutral, and the situation is completely changed, because with a neutral and a belligerent there remains a juristic relationship. And to this extent disagreeing with my friend Professor Brown who spoke this morning, so far from there being no such thing really as the law of neutrality, on the contrary, during war the law of neutrality is the only true law, for upon the neutral rests the trusteeship of international law.

In connection with submarine warfare, what may or may not be

permitted between belligerents is one thing. Whether belligerents will engage in certain acts depends upon the character of the belligerent or the fear of reprisal. Enter the neutral, however, and an altogether different situation exists. And there the juristic relationship between the neutral and the belligerent operates as a restraining influence.

Now, the submarine has been developed in an era when a merchant vessel with cargo engaged in international commerce rarely is wholly belligerent, but always, if it is a vessel of any size, some neutral element is involved. Hence the juristic idea is decidedly actually present in connection with submarine warfare, because neutral rights are almost bound to be involved.

The first duty with reference to the submarine is the duty of visitation and search. Does the duty of visitation and search rest on the part of any belligerent war vessel, submarine or surface, with reference to an enemy merchantman? Counsel in the case of the *Nereide*<sup>1</sup> denied that such a duty exists, but the Supreme Court of the United States took a different theory. It must be remembered, however, that the court took a different theory because of the fact that neutral interests were involved. If it could be shown always that no neutral interests are involved, possibly then upon the submarine there would be no duty of visitation and search. But there is hardly a merchant vessel upon the seas which has not some neutral quality either in cargo or passengers. It seems to me, therefore, with reference to all merchantmen of whatever flag the duty of visitation and search is absolute, because of the likelihood of neutral interests being involved, not because there is a juristic relationship between the two belligerents. If it is true that the right of visitation and search exists in favor of the merchantman, and that the duty of visitation and search rests upon the belligerent, it would seem that in most instances the submarine is unable to perform that duty. This would seem to be the basis for the position taken by the United States before we had serious difficulties over the submarine. If I remember correctly, in a note from the Department of State on the subject, prior to the sinking of the *Lusitania*, the position which was taken by the last speaker was in substance adopted, namely, that the submarine could not operate as a commerce destroyer. Unfortunately, in July of last year, in a note from the Department of State, it was stated that the United States noted with satisfaction that the submarine could operate in accordance

<sup>19</sup> Cranch, 388.

with the rules of international law and exercise the duty of visitation and search and remove passengers and crew to places of safety. The facts were that the vessels so visited by the submarine were comparatively small freight steamers. But I regard the change in position of the United States from one note to the other as a most unfortunate change, a change which I venture to think is reproduced in alarming fashion in a recent communication upon the subject, the last to be delivered. In that note I think we find two very strange and somewhat antithetical positions. Very clearly is it stated that the submarine can not operate against commerce; and yet the categorical demand is something quite different,—that the submarine must operate in accordance with international law. This, perhaps, might not seem to be so antithetical if one left out of view the memorandum of the Department of State dated the 25th of March which appeared in the papers yesterday morning. In that memorandum appears what I regard as a most unfortunate admission. The claim made by counsel in the *Nereide* case, but not adopted by the United States Supreme Court, is actually set forth under the authority of the Department of State, for it says that if property is known to be enemy, the duty of visitation and search no longer rests upon a belligerent cruiser, for, it states, the purpose and the sole purpose of such visitation and search is that of determining enemy or neutral character. That I think is a most amazing statement. It is not the sole purpose of visitation and search to determine merely enemy or neutral ownership. Obviously it goes further than merely to bring to the mind of a commander of a war vessel the question of enemy or neutral ownership. It is to secure in a permanent form the evidence of such ownership. To permit that question to be determined by the commander of a submarine or of any war vessel is really what I believe to be unfortunate concession. The abandonment to a large extent of what I conceive to be, in the absence of fight or flight, the duty of visitation and search on the part of the belligerent cruiser, raises a question which might be well put in answer to the question, How can a submarine operate in accordance with rules of international law? The answer may be given: Can it operate against merchantmen without exercising the duty of visitation and search if in the judgment of the submarine commander the property is enemy? No!

The CHAIRMAN. Does someone wish to continue the discus-

sion? I am quite sure that not all of the members of the Society present are in accord upon this matter.

PROFESSOR KARL F. GEISER. You may remember that in the great constitutional convention where fifty-five men sat four months to draft that immortal document, the Constitution of the United States, not over a dozen or a score, the historians tell us, made a positive contribution. The rest, however, were necessary to secure its appropriate representation among the people. I am in the class of the rest. I confess to being a layman of average ignorance on this question and not a specialist of international law, and my only excuse for taking up any time is to raise some questions that I wish might be discussed and concerning which I would like to obtain information to take to my constituents.

I may say that I agree essentially with much that has been said. I wonder, however, whether the question has been fully answered in regard to the rules of the submarines of the future. If submarines must operate according to the rules, the preëxisting rules, I think there is little doubt concerning the conclusions. I venture, however, to raise this question: Have the conditions, the new situations, the change in the mode of warfare, the change in vessels from wood to iron, the change in the submarine already referred to and discussed so clearly—have they not given reason for some claim to the non-extension, if not partial nullification, of the old rules to the present conditions? In an admirable article by Professor James Parker Hall in the January number of the *Journal of Ethics*, 1916, he brings out this point, which to me is rather convincing, and I think something might be said for the non-application of the old rules. I do not hold a bill of exceptions for the government using the submarine, and I want to state that nothing I say has any bearing upon the rules laid down by the Government of the United States during the war. I waive the question entirely of the wisdom or unwisdom of changing rules of war during a state of war. I simply can say that I have confidence in the administration, the Secretary of State and the Department of Justice, to handle that question properly. So what I have to say refers entirely to the rules of the future.

Now in the past, to mention only a few cases, we have recognized the need of some change due to new situations. For instance, Secretary Evarts in 1876, in reply to the Russian Minister concerning the

placing of mines in the bed of the Danube, said, in effect, that the invention by the belligerents of the mine was so recent a device that he did not believe the Powers were ready to express themselves concerning it, and he had, therefore, no opinion to offer concerning it.

Again, in the Russo-Japanese War mines were laid in the open sea and condemned freely by all neutrals because they injured innocent neutral commerce, and the Hague Conference of 1907, Convention No. 8, I believe, did not forbid such use. Now, if an international peace conference is not ready to forbid the use of such a weapon, can it be expected that a nation which feels that it is using it in self-defense—and after all that question must be decided by the nation itself, whatever we may think about it—will desist from its use? When a nation is fighting for its existence and the submarine is the only weapon that it has, will it not use it? We would; any nation would. That is an obvious fact and we must meet it. Is there, then, any great harm in changing the rules, if the rules can be changed to the particular detriment of no state? And while I am not prepared to say what those rules would be, I would suggest a reclassification of vessels on the basis of cargo and passengers.

On the question of the use of armament on merchant ships, while I do not raise the question of the justice of this rule at the present time, should, for instance, a rule which permits armament and ammunition upon a vessel carrying at the same time, women and children, become a part of the submarine code of the future? If women and children are aboard that should be evidence that the cargo is innocent and that the ship is not armed for offensive purposes. Should women and children ever in the future be a guarantee of immunity from attack? Should not munitions of war be carried on other vessels than those which carry innocent cargo and passengers? I believe the sentiment in the United States would support such a rule at the present time.

Again, why not do away with blockade except for munitions and an internationally agreed upon contraband list? We have had pointed out to us this morning the difficulty of defining contraband. I know there is a twilight zone between absolute contraband and non-contraband, and yet there is a difference. What harm would there be, after all, if a state were given the right to trade freely with both belligerents? Is freedom of the seas to apply only to submarines?

Finally, I take it from the conclusions that I draw from the preceding discussion that the submarine is to be outlawed, certainly as a

commerce destroyer. What about the submarine, then, for use as a defensive weapon by the smaller states? Is it not likely that the United States is going to develop the submarine in the future more than any other nation? And should we not in our own interests—and our own interests should always be justice—take that into consideration? We hear much about outlawing the submarine by Powers A and B and C combining against D. I merely call attention, then, to this question: Can we make an effective rule that is not assented to voluntarily by all the great Powers now at war? Right or wrong, could we make a rule that would be binding without the consent of Germany, and do anything more than form a new alliance, shift the balance of power and the storm center, perhaps, and be opposed by another alliance? International law rests upon the idea of mutual concession and mutual acceptance by all states.

The submarine has, in the present war, proved to be an effective weapon, and its possible development will make it certain to be a more important factor in the future. As a commerce destroyer it has come to stay. The question then, in my judgment, that this conference should consider, is not how to outlaw this new weapon of war, nor how to form a combination of states against another state which uses it effectively, but rather to consider a reorganization of the old rules to meet the new situation on a basis satisfactory to all nations coming within the scope of international law.

Captain W. L. RODGERS. I do not wish to discuss the legal aspects of the question, but it may prove interesting to suggest to the meeting that the submarine question as we know it arises out of the broad strategic situation relating to the control of the surface of the sea, which control has lain in the hands of the Allies since the beginning of the war. Like other ships, the submarine is armed with gun and torpedo. It is quite practicable for the submarine to make a prize under the same conditions as any surface craft. But owing to the hostile control of the surface, the Central Powers can not send prizes into port and therefore their submarines destroy the ships of which they would otherwise make prizes. The action of the *Moewe* in destroying several prizes and sending one only, the *Appam*, into port was quite analogous to the conduct of submarines and arose from the same fundamental cause, the hostile control of the sea surface. Earlier in the war, the *Emden's* behavior was much the same.

While the Allies' sea power remains unchallenged, the whole conduct of the Central Powers' naval campaign must necessarily be one of minor incidents possible through evasion, stealth and surprise. Our attention is centered on submarine work, only because the nautical qualities of these vessels enable them in great measure to secure their own safety by dependence upon sudden and unforeseen attack.

The submarine is preëminently a weapon of the weak. The English Navy was behind all other great navies in adopting the submarine because it was satisfied with conditions as they were and was loth to modify, or to see others modify, the terms of its superiority. The use of the submarine for war against commerce is an attempt to avoid the consequence of naval weakness.

We should consider whether as a matter of principle there is any reason why the accepted rules of naval warfare should or should not deliberately favor the eccentric, small and hasty operations which only are possible to a belligerent substantially inferior on the sea to its opponent. Should the rules of naval warfare be analogous to the handicapping rules of a race meeting?

It seems that the rules of warfare should favor those methods of war which facilitate organization, system and centralization in carrying on war. Rules so framed necessarily favor the stronger party, and such are the rules of land warfare. There seems no reason why maritime rules of war should have another basis.

MR. EVERETT P. WHEELER. Mr. Chairman, may I attempt to answer one or two of the questions that have been put? It was said by Coleridge a century ago that on all occasions the beginning should look toward the end, and especially in times of difficulty and distress. Those times we are in. And in answering questions such as those which were put by the speaker—not the last, but may I say the penultimate speaker—we want to consider what our object is in dealing at this time with questions of international law with reference to the future. It is clear that up to the time of the war now raging such warfare as that which the submarines are carrying on was unlawful. It would have been, I think, generally considered piratical. That was the phrase which Mr. Jefferson applied to similar attacks by the Barbary cruisers. They had commissions from the Barbary Powers, but such attacks as they made were without warning, destroying without bringing into port, making captives, perhaps, but solely for the purpose

of ransom. Their attacks, which were precisely similar to those of the submarines at the present time, were designated as piratical and we felt called upon in the beginning of the last century to send cruisers to the Mediterranean and suppress them, which we succeeded in doing.

However, we have a new machine that can go under water, that can creep up to its prey without being detected until it approaches very near, and the thing for us to consider is what we want to bring about in the future. If we have in mind, as there are many of us who have, the plan of a congress of nations when this war is over, which shall create an international court and put behind it an international police capable of enforcing its decrees and in that way enforcing the agreements made between the nations, then our object would be to extend and enforce the restrictions which up to this time civilization has gradually been placing upon methods of warfare that barbarous nations like the Algerians considered quite proper, but which civilization finally has agreed to condemn. There are others that I might refer to. I mention but one. In the time of the Napoleonic Wars it was considered not particularly censurable to give a captured city up to pillage, if it were taken by storm. During the century that has elapsed civilized nations have come by agreement to condemn such practices. We have our Hague Conventions and our Geneva Conventions which have, when carried into effect, greatly mitigated the severity and the cruelty of war. Lord Bacon began the beneficent work when he said that "Wars are not massacres and confusion, but the highest trial of right." Indiscriminate slaughter, however, certainly is a massacre; and so long ago as when he was chancellor he saw that that was not the direction in which the path of civilization should direct.

It seems to me that all who are interested in international law should strive for, and in all our discussions bear in mind, what modifications, if any, should be made in the rules of warfare which will tend to mitigate its severity. You may say a nation is fighting for its existence, but if you had an international court and an international police, nations would not have to fight for their existence. We have conventions which I have referred to and which are in the minds of all of you. They were good in themselves; they read well on paper; but they had not the sanction of some central authority behind them, and, therefore, when the time of stress came

one of the great Powers designated them as scraps of paper. We want to have something more than a scrap of paper. We want to have something behind the scrap of paper that shall make the paper live and give it power, and if we are striving for that, as it seems to me we ought to strive, then let us not concede one tittle of any of the modifications in the direction of humanity that the nations have thus far agreed upon. Let us rather strive to extend them.

To sum up what I have said, I would answer the question put by my friend by saying we must stand firmly upon the principles that have been agreed upon thus far. We must not concede a jot or a tittle of them, and in that way we may hope in the end, when this struggle is over, and it must end sooner or later, to be able to construct the fabric of international law that has received so many rude shocks and seen so many of its beautiful monuments destroyed by the rude fire of those who have disregarded its sacredness. Why, ladies and gentlemen, it seems to me that at present as a living, active thing the fabric of international law that many of us have been striving to rear is almost as ruined as the great Cathedral of Rheims. This ought not to be. We can recall it, we can restore it, we can stand for that restoration. I do not mean to say that it is gone forever, but I do mean to say that it has received so many rude shocks in this cannonade that it is not an active, working, living code in force as it was twenty years ago. Now, let us stand for it. Let us make no concession in any of the principles that we have succeeded by the toil of centuries in achieving, and let us look forward to the time when there will be a better condition in international affairs, when there will be given the sanction that thus far has been lacking, and when we may hope for a condition when peace shall reign, a peace founded upon righteousness and vindicated by the authority of law.

The CHAIRMAN. Are there others who wish to take part in the discussion?

Mr. GUTHRIE. May I be tolerated to speak again, Mr. Chairman?

The CHAIRMAN. Certainly.

Mr. GUTHRIE. I desire to call attention to the fact that there is another phase to this question of taking in the prizes. I refer to the

situation where a nation can not get at its own ports. If I understand the situation correctly, one of the reasons why the Central Powers can not get at their own ports is the fact that the submarine and mine have an entirely transforming relationship to blockade. The English Government can not blockade the ports of Germany as we blockaded the Southern ports because of submarines and mines. They, therefore, established, as I understand it, a rather unheard of and to my knowledge of the subject a still not legalized mode of blockade, due to the fact that the submarine and the mine had introduced an entirely new element into blockades. The English say that they can not blockade the German ports as other ports have been blockaded because of these two new features in warfare. I simply arose to ask the question if it were not true that a part of the difficulty of taking in prizes is due to a questionable mode of British blockade, which in its turn is due to unavoidable relationship between mines and submarines, a relationship to the whole subject of blockade. I was wondering if there was any analogy worth while between changing the laws of warfare and the subject of *ex post facto*. I think that in several cases the United States Supreme Court has held that you can change the procedure. In the case of *Kring v. Missouri* it was held that the constitution or law affecting general procedure could be changed during the progress of a case. Kring was being tried in Missouri for murder, and there was a change in the very mode of procedure, in the constitution of the State of Missouri, which prejudiced Kring. In fact, under it he was sentenced to death. If there is any analogy in a change of procedure in war and procedure in private affairs it seems to me the presumption is favorable to a change of the procedure in international relationships. There are several other cases in our Supreme Court where it has been held that there can be a change of judicial procedure even while a trial is going on in which a man is being tried for his life. I am very much interested, if I may say so, and I think we all are, in the very fine remarks of Mr. Everett P. Wheeler this afternoon in our presence.

MR. GREGORY. Mr. Chairman, if I may trespass again for one moment on the time of this assembly, may I ask how the doctrine of blockade would apply to the taking in of prizes for contraband? That is governed entirely by other rules.

Mr. BERNARD C. STEINER. Can you tell, Mr. Guthrie, of any instance when there has been a change in the status of a party during a trial?

Mr. CHARLES S. BRAND. And I also want to know, granting that there was a violation or that England is violating the rules of blockade, does that give any right to the use of the submarine as it has been used, as, for instance, in the cases of the *Lusitania* and the *Susser*? Granting that England has violated all the rules of blockade or in other matters, does that justify the use of the submarine as it has been used?

Mr. GUTHRIE. I would like to say that I am fairly in agreement with such men as Von Mach, who says that the present international law of the world is largely a product of *ex parte* procedure, and I will state in answer to the gentleman who asked me the first question that not only have the laws of war been changed by one party, but I think the law of naval warfare practically in the last hundred years has been laid down by one of the parties, and that party is England.

Professor THEODORE P. ION. This morning I tried to explain briefly the matter of blockades. I would like to ask Mr. Guthrie to point out one single authority in which it is stated that the rules of blockade have been laid down in the interest of the belligerents. Anyone who knows anything about international law knows that the rules which have been laid down in the Treaty of Paris of 1856, and later on embodied in the Hague Conventions, have been for the purpose of protecting the neutrals and not the belligerents. It is immaterial to the belligerents if the blockade is effective or ineffective. I would like to add that in the history of the law of nations you can not find an instance in which belligerents have complained against blockades on account of their ineffectiveness. The right of complaint belongs to the neutrals.

The CHAIRMAN. Is there any further discussion? If not, we will adjourn until eight o'clock this evening, when the subject will be the question of war zones upon the sea.

(Thereupon, at four o'clock p.m., an adjournment was taken until eight o'clock p.m.)

#### FOURTH SESSION

Friday, April 28, 1916, 8 o'clock p.m.

The Society reconvened at 8 o'clock p.m., Mr. JAMES BROWN SCOTT, presiding.

The CHAIRMAN. Ladies and gentlemen: In the absence of the President of the Society it is my privilege to act as chairman of the meeting this evening.

The subject for discussion is one of great interest and importance, namely, Should the right to establish war zones on the high seas be recognized, and what, if any, should be the provisions of international law on this subject?

The speakers of the evening are Amos S. Hershey, Professor of Political Science and International Law in the University of Indiana, and Francis N. Thorpe, Professor of Political Science and Constitutional Law in the University of Pittsburgh.

At the end of the papers there will be an informal discussion by the members present. The order will be slightly changed because of the absence of Professor Thorpe, whose paper I shall have the pleasure myself of reading, after which Professor Hershey will be good enough to deliver his own paper in person, and then the topic will be thrown open to discussion.

SHOULD THE RIGHT TO ESTABLISH WAR ZONES ON  
THE HIGH SEAS BE RECOGNIZED, AND WHAT, IF  
ANY, SHOULD BE THE PROVISIONS OF INTERNA-  
TIONAL LAW ON THIS SUBJECT?

ADDRESS OF FRANCIS NEWTON THORPE\*

*Professor of Political Science and Constitutional Law in the  
University of Pittsburgh*

By international law is understood the rules which determine the conduct of the general body of civilized states in their mutual dealings.

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\*Read in the absence of Professor Thorpe by Mr. James Brown Scott.

By the high seas is understood, in admiralty proceedings, the waters of the ocean from shore to shore at low water mark; in international law the high seas means only so much of the ocean as is exterior to a line running parallel with the shore and at some distance therefrom, commonly such distance as can be defended by artillery upon the shore, and therefore a cannon shot or a marine league, that is, three nautical, or four statute miles. By a war zone is understood a naval zone of active operations interdicted to neutrals and non-combatants, a closing of waters unquestionably part of the high seas, to secure the effects of a blockade. By a right, as that word is applied in international law, is understood a function or office of sovereignty as applied to a nation.

The question now under examination therefore must be understood to ask whether international law recognizes, or should or should not recognize, the establishing of a war zone as a truly sovereign act. Though the question is new and grows out of a conception brought into prominence by the present European War, it is only one of many questions, each more or less novel at the time of its formulation, incident to the prevailing conception of national sovereignty. This is to say, given the prevailing concept of national sovereignty, should international law recognize the right of a nation to establish war zones? Or, should the concept of national sovereignty be so modified as to eliminate the possibility of the establishing of such zones?

The immediate case is that of the British and German war zones existing, according to the declaration of Germany, and comprising the northern and western coasts of France, as well as all the waters surrounding the British Isles. Within this area, so Germany has proclaimed, all enemy vessels found by Germany will be destroyed, and neutral vessels will be in danger. This declaration is a claim by Germany of right to torpedo at sight, without regard to the safety of crew or passengers, any merchant vessel, under any flag, found within the zone.

In execution of this claim, Germany, though unable to maintain any vessel on the surface of the waters of this zone, carries on attacks by submarines. These are unable to comply with the obligations hitherto accepted as binding in war, that is, to discriminate between neutral and enemy ships, or cargo; duly to examine and verify the status of the captured vessel and to become responsible for the safety of its papers; not to sink the captured vessel, save under extraordinary

circumstances, and never then save after adequate measures have been taken to save the crew and the passengers; to take the captured vessel before a prize court which shall determine all questions involved, and to observe all duties of humanity. The German submarine complies with none of these so-called obligations of international law. It destroys life and property without regard to rule, obligation, agreement, or observance of practice hitherto observed by civilized peoples. Germany defends its procedure as fully warranted in order to effect a blockade of Great Britain and France, to cut off these nations from supplies from neutrals, or from other sources. It is defended as an exercise of the sovereign right of Germany to self-defense.

Great Britain and France, claiming the rightful exercise of the like sovereignty, consider themselves free to stop and to conduct into their ports vessels from any port supposed to be carrying merchandise or supplies destined for Germany, whether such merchandise or vessels be the property of the enemy, or of a neutral, whether such vessels be going to or coming from said enemy.

The appeal to rights of sovereignty is made alike by each belligerent: the right to self-defense. Neutral commerce on the high seas thus becomes subject to seizure and to possible confiscation in British or French prize courts; it becomes subject to destruction, together with the lives of the persons immediately in charge of it, by German submarines. The rights,—also sovereign rights,—of neutrals on the high seas are thus ignored by the belligerents,—the Central Powers, on the one side; the Allies on the other. Thus this interdiction of a portion of the high seas as a war zone involves quite the entire subject of international law, as hitherto understood: blockade, neutrality, commercial rights, the high seas, and, fundamentally, the conception of sovereignty as applied in our day to nations.

In November, 1914, and February, 1915, there was founded, at Berne, Switzerland, an *Association pour la Sauvegarde du Droit des Gens*. The purpose of this association is declared to be "to institute an impartial inquiry into cases of the violation of international law." "The only sanction left for enforcing respect for violated law," so this association declares, "resides in the reprobation of public opinion everywhere." "The opinion of the civilized world," it continues, "must be able to restrain within just limits the forces or passions let loose by war." "A great gulf is opening between the peoples of the earth." The appeal is "to the best minds in neutral lands." The

grand purpose, it is declared, is "to further the interests of *Truth*, the triumph of *Law*,—*pro luce et jure*—to combat error, a fruitful cause of division and hatred between nations, and by this means to contribute to the reconciliation of the best minds everywhere."

This *appeal* by one of the neutral nations, a nation whose sovereignty is guaranteed, as was that of Belgium, is in sharp contrast to events and facts growing out of the *command* of another nation, a sovereign, with respect to the invasion of Belgium. The appeal is to public opinion of the civilized world. The intimation is that such an opinion exists and that it is capable of regulating international affairs, of enforcing respect for violated law; indeed, of giving form, content, meaning to that law. The presupposition here is of the existence of a body of international law. It is, as it were, an appeal to return to first principles, to "the faith of the fathers." On the other hand, in these troublous times, some venturesome minds, doubtless clouded by the troubles of the day, have doubted whether the fathers had aught of faith; whether international law ever existed; whether *pro luce et jure* can be realized by enforcing respect of what has been called "international law"; whether creation is not demanded rather than restoration; whether old conceptions of national sovereignty must not be abandoned; whether the entire world must not have "a new birth of freedom" in the *interests of truth and the triumph of law*.

The question under examination involves many particular questions, which to state is to answer them. Suppose this question were to be approached in the Socratic, or the Franklinean manner.

Are the high seas the common highway of nations?

Can a state of war between or among nations, or any of them, change the character of the high seas?

Can a state of war give or establish title in a belligerent, or belligerents, to the high seas or any part of them?

Are the high seas the common property of all mankind only in time of peace among nations?

Is the true character of the right, title, use, or easement of the high seas determinable only in time of war?

Do belligerents (or does any belligerent) alone have the right to determine, limit, bound, prescribe, fix, establish, maintain title to, ownership or use of the high seas?

In such time (of war) does a neutral (or do neutrals) cease to have any such title, right or use, to, in or of the high seas?

Are neutrals (is a neutral) dependent on belligerents (or any belligerent) for such right, title or use?

Then do the high seas belong to belligerents (or to any belligerent) only?

Are neutrals (is any neutral) the user of the high seas only at the will (by the sufferance) of belligerents (any belligerent), and not by original right, that is, right of sovereignty?

Do the high seas belong only to the Power (nation, or sovereignty) which can, for the time being, dominate them?

Are neutrals (is any neutral) both *de jure* and *de facto non pares inter pares* unless they (or either of them) cease being neutrals and become belligerents, and not belligerents only, but belligerents dominating or controlling the high seas?

Have neutrals (or any neutral) rights on the high seas which belligerents (or any belligerent) are bound to respect?

Is the right to use the high seas, at any time anything more than a privilege granted, *de facto*, by the most powerful belligerent?

If any national at any time has not a right to but only a privilege in the use of the high seas, what becomes of the fundamental doctrine of international law: the doctrine of *pares inter pares*?

If every national uses the high seas as a means of realizing its sovereignty how can that doctrine be maintained?

Therefore, starting with the doctrine of *pares inter pares* and its applications under international law as hitherto expounded, is not the establishing of war zones on the high seas a fundamental right of any nation or nations, the sole deterrent, on final analysis, being a matter of expediency?

In other words, if we start with the doctrine of national sovereignty, is not recognition, by international law, of the right to establish war zones on the high seas implied?

But other questions demand utterance:

How can belligerents (for the creator of a war zone is *de facto* a belligerent under the rules) maintain exclusive title, right or use, to or of the high seas?

(1) By actual patrol of said seas (technical, physical possession of them).

(2) By blockade (that is, an effective blockade).

(3) By declaring a designated marine area such a zone, as by a Berlin Decree or an Order in Council. Such a declaration places all

neutral vessels in danger, and by so much succeeds in establishing the war zone.

As to the location of a war zone:

Shall it be located at the will of the belligerent? For example, if Germany can declare British and French coasts a war zone, may that zone not be extended indefinitely so as to include any portion of the high seas over which merchandise may be conveyed from any source, thus operating up to the marine league limit of any nation, along its own coast? May not such a war zone be declared to include the Gulf of Mexico, or the immediate Atlantic or Pacific waters of the United States? As a matter of right the entire area of the high seas may be declared to lie within a war zone as any particular area. Thus a German submarine might destroy an American merchantman just leaving New York waters as well as an American merchantman just entering the North Sea.

But the belligerent defends his policy of declaring a war zone by appealing to the fundamental right of self-protection: the maintenance of national existence, the continuance of national sovereignty. And this is the great appeal with every nation. All other obligations yield to this one. "Skin upon skin, yea all that a man hath will he give for his life," translated into terms of international law may read, "All acts necessary for self-existence may and must be done." This is the fundamental of the doctrine *pares inter pares*.

This doctrine, as traditionally expounded and applied, includes the doctrine of neutrality. In this connection there are other questions, not a few, as for example:

Is the doctrine of neutral rights compatible with that of establishing war zones?

Does the sovereign right of a belligerent outweigh the sovereign right of a neutral?

Does the existence of a state of war eliminate, in any degree, the sovereign rights of neutrals?

Evidently the essential right of the national sovereignty, its right to existence, to continuity as a nation, as this right is interpreted and applied by itself alone, or with allied Powers, or by consent of the nations, must be examined in order to understand the right, if such exists, in any nation to establish a war zone.

The fundamental of national right is the right of self-defense; of perpetuity; of remaining a sovereign. Thus by the exercise of this

right a nation acquires territory by conquest, purchase, treaty, exploration, accretion, or in any way whatsoever by which it can acquire it; and, conversely, by the same right it can dispose of territory. By this right it regulates its domestic affairs, and also acquires such aids and advantages, from other nations, as are within its power, by war, by treaty, by compliance, or whatsoever form of agreement it may accede to. A nation is the sole judge of the necessities of its own existence. It is responsible to itself and its own people, or to such person or persons as may on final test, determine the course of its affairs. To this end forms of government exist, whether democratic, representative, monarchical, or other; and the body of law by which its domestic affairs is regulated, a body of law more or less organic, is denominated constitutional law. The marks of sovereignty distinguishing the nation are well known to text-book writers, to statesmen, and, generally speaking, to citizens or subjects of the nation.

But there are many nations, some physically weak, others powerful. However, sovereignty is not determined, according to the definition found in the books and in practice at all times, by this theoretical equality. Equality is held to be a fundamental in testing sovereignty, *pares inter pares*. This conception is declared to be a working principle in world-government. Because it has worked with less violence to a conception of sovereignty founded on abstract right than to a conception of sovereignty founded on actual might, it has been accepted, and is today accepted as the true basis of international law. The practical difficulty in the administration of the theory is the administration of the theory: to hold the scales evenly when Germany is in the one and Belgium is in the other: to ignore material and physical discrepancies and to recognize the ethics of the case, as it may be rudely stated, that the all of a small nation, is as to sovereignty, equivalent to the all of a great nation. In other words, the concept of interstate relations, *pares inter pares*, and the concept of individual relations, all men are created equal, are essentially the same.

But difficulties at once spring up. The nation does by the individual as the nation is not done by. The nation prescribes for its individual citizen or subject or group of subjects or citizens many limitations, as for instance, limitation of industrial activity, a course of compulsory activity, a denial of any activity. It limits citizen or subject for its own ends, as it wills. It proceeds on the theory that such limitation conduces to the general welfare, that is, when the idea is stripped to its

real meaning, the state proceeds to do, as to its citizens or subjects, all those things which, in the opinion of the supreme power in the state, enable it to remain the state. Thus the state limits private fortunes, prescribes military and naval duties, regulates trade and commerce, deflects industrial activity to particular channels, dictates education, establishes religion; in short, controls the lives and fortunes of its people. This control may be exercised under some general plan of government, as a constitution, written or unwritten; or it may be exercised at the will of an absolute monarch. Whether exercised as in a democracy or as under absolutism, it is the exercise of sovereignty, and by the doctrine *pares inter pares*. And no political corollary is more widely accepted than that each nation as to its own domestic affairs is a law unto itself.

But the nation, the unit in sovereignty, is but one of many units in sovereignty. The fundamental conception of sovereignty is to continue sovereign; as the fundamental conception of life is to live. Whether there was ever a time when the individual citizen or subject was unlimited by the state in which he lived we do not know: it may be said that we can not conceive of the state as existing if such limitation was absent. The essential characteristic of the state is limitation of the individual subject or citizen, a limitation having a dual nature, for his own benefit, and for the benefit of the state. Government is limitation. A nation is a nation because it succeeds in maintaining limitations on the citizens or subjects within its borders. Thus it may be declared to be an axiom: no limitation, no state.

Civilization is limitation. The phrase "the perfect law of liberty" is not paradoxical. The price of civilization is limitation. But the process by which the state, or nation prescribes limits, however notably its own, is tested by processes prescribed by other nations for like ends, and its results are judged according to the prevailing ideals at the time. By prevailing ideals there may be understood the ideals held by the people who compose the particular nation, or that ideal or ideals held by other nations. The prevalence of an ideal depends upon race, climate, industrial activities, morals, trade, productions, commerce, transportation, knowledge, that is, upon not only the economic, the social relations which exist between and among the people of the nation, but also between and among nations also. Thus government becomes greater than a mere national problem, it becomes a world problem.

In a nation there are two civil elements: the individual and the

state; the particular and the general; the part and the whole. Considered as a domestic, a constitutional question, there is no insurmountable difficulty in prescribing limitations of individual activity. The defense is ever the same,—the welfare of the state and of the individual. If the state is conserved, the individual is conserved. The essential difficulty therefore is to conceive aright the function of the state. This always means a conflict of ideals, ethical, ethnical, industrial, political, religious, educational, call the aspects what we may. Or, to use a current word of no small meaning, it is a question of *kultur*. What *kultur*? The state of mind at the time prevailing: it may be pagan or Christian; pacific or warlike; monocratic or democratic; industrial or static,—indeed as various as have been *kulturs* in the past, or at the present.

Is there no common measure, no common regulator of *kultur*? The Swiss *Association pour la Sauvegarde du Droit des Gens* would have us believe that such a regulator is "the opinion of the civilized world" (*cette opinion du monde civilisé*). But suppose that a powerful nation sets up an ideal of *kultur* which other nations reject! By the doctrine of *pares inter pares* that nation's ideal is a part of its sovereignty; by that doctrine, there may be as many *kulturs* as there are nations and as to *kulturs*, *pares inter pares*. If one of these nations, exercising its sovereign rights, as it understands them, for the purpose (as it understands its own purposes) of self-defense, that is, in order to maintain its own existence, wages war in order to compel compliance, by other nations, with that *kultur*, and actually compels such compliance, and in the course of its activities to that end establishes war zones, what if any violation of law (to use a phrase employed by the Swiss Association) has it committed?

If in this activity this nation is joined by other nations, animated by the same idea of *kultur*, and these allied nations succeed in compelling compliance in other nations, has not this joint action established, to the extent of its success, an empire of *kultur*, together with all that is thereby implied? And what limit is there to such activity? What limit is there to any method employed or likely to be employed by that nation and its allies in extending the empire of its *kultur*?

The question of establishing war zones is only one of the questions more or less new arising in the course of international affairs. Can a nation defend itself with noxious gases? With air ships? With floating mines? With artillery making havoc at thirty miles? With

armored ships? With submarines? With weapons of any kind? With ideas? With inventions commonly called utilitarian?

If by sovereign right a nation resorts to ultimate methods of defense, whether the product of the university laboratory or of the savagery of men in deadly personal conflict, and all this be in harmony with its *kultur*, who shall deny the claim of right?

Of course the answer is from those who, equally claiming sovereign rights, deny the *kultur*. By the doctrine of *pares inter pares* one nation has as much right to deny as another nation has to affirm the claims of a particular *kultur*. But if the combination of nations which supports one *kultur* surpasses in might the combination of nations which supports another *kultur* and the lesser in might yields to the greater, then public opinion is said to sustain the victorious *kultur*. So the "opinion of the civilized world" is the opinion of triumphant nations supporting a common ideal.

The practical problem then is one of combining the nations. Whatsoever opinion shall dominate the world must be supported by the dominant might of the world.

Almost innumerable are the suggestions, the plans, the devices put forth from age to age, one may say, from moment to moment, in the hope, not to say confidence, of answering the question, How shall the world be governed? A familiar presentation is of the drain of armaments in time of peace, implying of course a heavier drain in time of war. Thus at the time of the outbreak of the present European War, the world's annual armament bill was said to be quite two and one-half billion dollars. This did not include the amount of capitalization for military purposes, that is, for the immediate manufacture of munitions and supplies for war, not merely weapons as commonly understood, but supplies such as foods, clothing, medicines, military and naval education, and the economic cost of the deflection of human energy from peaceful to warlike activities. Unfortunately there is no estimate, possibly none can be made, of the world's annual peace bill; of the valuation in dollars of all activities which are not distinctively for war. There is reason to believe that the valuation of peaceful activities the world over far exceeds the valuation of war activities. War is commonly spoken of as the exception rather than the rule in the modern world. Peace may be said to be the recovery from war. But human life is commonly estimated by health rather than by sickness.

Suppose that the *kultur* of a nation is an embodiment of the belief

that a state of war expresses a higher civilization than a state of peace. In the United States the civil is above the military authority: thus this allocation of possible activities gives character to the American idea of *kultur*. But there are powerful nations whose *kultur* is of the supremacy of the military over the civil authority.

The world has been told that an industrial people ever desire peace, but the spectacle is now presented to the world of a people famed for industrial efficiency who desire war. With spindles and looms, and engines, and furnaces, and factories of all sorts and kinds, we have been told there ever goes peace, prosperity, sanity, comfort, civilization, and that "the killing of workers and the destruction of property are a hideous waste of human effort. War has done more than anything else to retard the progress of mankind." Over against this accusation against war there is made an accusation against "the killing of workers" by the hideous waste of human lives in factories, and not merely of men and women but of children and of children yet unborn. We are told that war destroys life and property; we are also told that in the industrial world lives are destroyed and property is held by the few whose lives are not risked. Yet, strange to say, armies are composed of men who, if not under arms as professional soldiers, must be workers in various industrial activities.

Again we are told, by a learned French professor, that the demand of Germany for a market for her wares is the real cause of the present European War; that German notions of industry are German notions of world policy. We are told that so sharp is competition today, Germany wages war to gain a commercial place in the sun. We are told again that the fearfulness of the present war is commensurate with the industrial efficiency, the *kultur* of the belligerents. We are told that the German university, the German laboratory, German science, German education, the wonderful German mind is fighting this war.

If we turn to Thucydides or Livy, to Polybius or to Tacitus, we do not find economic explanations of war. If we turn to the Wars of the Roses, or to the Napoleonic Wars, or even to such a recent war as that of the American Revolution or the War with Mexico of 1846-48, the explanation is not economic. Usually, the explanations of war are, or attempt to be explanations of political or religious differences, possibly racial differences, but it is reserved to the present European War to find expounders and exposition in economics and industry. If Germany had been a strictly agricultural state there would have been

no war by Germany. Had the globe offered unexplored regions suited to colonization, such as America offered three hundred years ago, there would not have occurred the present European War. But the world is practically all taken up by first comers. England was largely in possession when Germany arrived. A war ensued, and we are gravely told, necessarily ensued among the Powers over the world market. Germany demanded the share she claimed in that market. Her *kultur* identifies her existence with the possession of what she considers her share in that market. Her *kultur* makes the military superior to the civil authority. Her *kultur* identifies her laboratories, her schools, her universities, her wonderful mind with not only her local existence on the continent of Europe, but with her continued existence as a nation.

Now within a nation, were an individual or a subject to make a similar *kulture* the practice of his life, the state would promptly impose limitations upon him, for the good of the state, and (at least by assertion and legislation) for his own good. Such imposition of limitation is common experience in nations. Even though that individual citizen or subject may possess the highest efficiency, though he may be able to coördinate other individuals or subjects with him and so increase his efficiency, the nation, the state, nevertheless limits him, even if by compelling him to take in the state as partner. In process of exercising this power of limitation, the state may imprison him and confiscate his property; it may even put him to death. In other words, in its function or office of realizing its *kultur* the state or nation resorts to confiscation and the death penalty. The public opinion of (within) the state sustains the state in this procedure.

Now public opinion is not easily defined, but it may be loosely defined as the will of the sovereign. That sovereign may be the will of a majority of citizens or subjects or the will of the absolute monarch. It is not a constant; it varies from time to time. But the will of the state is the supreme law of the state.

Is the opinion of the civilized world relative to the world comparable to the opinion of the individual state? Is it possible to formulate that world opinion and to make it the basis of the limitation of nations as public opinion within the individual state prescribes the limitation imposed by that state upon its citizens or subjects?

This appears to be the real question now at issue: the fundamental question when we ask, "Should the right to establish war zones on

the high seas be recognized and what, if any, should be the provisions of international law on this subject?"

International law is not law in a domestic, constitutional or statutory sense; it is a rule, or collection of rules, agreed upon by civilized states in their mutual dealings. It is an expression of interstate, or international opinion. It is a more general rule than a national constitution, much as a national constitution is a more general rule than a statute. Strictly speaking, if world opinion suffers the establishing of war zones, then war zones are internationally lawful. In international law, as in constitutional or statutory law, a distinction is made between things lawful and things moral. As in our relations as citizen to citizen, a matter may be strictly lawful yet be essentially immoral, or even unmoral. Perhaps the relation between morals and law may be intimated when it is said that discarded legislation has been discarded largely because it proved by experience to be immoral. Or, stated in another form, the legislation of the states of the world tends ever to approach morality. No conclusions are more familiar than the declarations of the Hague Tribunal concerning expanding bullets, asphyxiating gases, projectiles and explosives from balloons and aerial craft, the treatment of civilians by armies, and submarine mines. All these conclusions, it is trite to remark, are deducible from generally accepted moral ideas. Yet, during the present European War, agreements signed by Powers now belligerents have been ignored. And why ignored? Because of the lack of a sanction or vindicatory power to enforce them. Will world opinion, public opinion, enforce them? It has not enforced them, whence the conclusion that there is no such public opinion.

As the most sacred duty of the state is to do all within its power to remain the state, so will it ignore international agreements, even entered into by itself, if its existence is threatened by adherence to its agreement, that is, if in its opinion that existence is threatened. But what if in seeking to maintain that existence it resorts to practices condemned by world opinion? Will it not flout world opinion in order to defend itself? Suppose that world opinion is sanctioned by such a world organization of nations that the practice of a forbidden procedure brings the offender at the bar of the world organization, an organization able to enforce its rules?

If this world organization or union of various like-minded nations forbids the establishing of war zones, and this organization is mate-

rially able to enforce its rules, no war zones will be established. If the enemy with which a nation is at war is able to prevent that nation from establishing a war zone, none will be established. At present England and France and their allies are not able to prevent Germany's establishing such a war zone.

If the question were strictly a national question, not an international one, the state itself would determine it, that is, Great Britain or France would quickly determine what if any limitation shall be imposed upon its citizens or subjects. For example, France saw fit, for the general welfare, to impose limitations as to the manufacture, sale and use of absinthe. Could the whole world, or the actually dominating Powers of the earth agree upon a procedure, as, for example, the eradication of piracy, then that procedure would be international and piracy would be eliminated from the earth.

But in arriving at international agreements, trade, commerce, safety in travel and transportation, rights of conscience, and the like thus far are the chief theme. International law has never trespassed upon the essential and fundamental right of a nation to self-defense, or, if it has trespassed, it has never actually combatted the right. Nations have so combatted, but international law has never recognized the right of international trespass. This is as much as to say that international law, rude as it has been, rude as it is today, feeble as it has proved to be repeatedly, has ever recognized the doctrine of national sovereignty. I say, "ever"; more carefully speaking, I must say, that it has so recognized the doctrine since the days of Grotius and his theory of *pares inter pares*.

Suppose that world opinion chooses to formulate a peace pact to prevent war. Is an alliance for peace any more foreign to human welfare than an alliance for war? If we presume to measure nations by their armaments may we not also measure them by their peace assets? If more capital, if a greater portion of the labor of a country is engaged in working for peace rather than for war, might not a peace alliance actually out-capitalize a war alliance, and thus on the low plane of mere material strength form a working basis for the peace of the whole world?

But alliances presuppose acceptance of a common ideal; a common *kultur*. It is impossible for strangers to agree; as soon as they agree they have ceased being strangers. It is impossible for nations to agree until they have individually accepted the same *kultur*. Is there a

peace *kultur* as well as a war *kultur*? Does the formation of a peace pact among nations mean essentially the formation of a war pact? Very likely. But the formation of a peace pact is a formulation of an opinion; and if formed by the nations of the world, or by those who dominate it, that pact becomes a sanction for peace, and as yet no such sanction has existed as a world power or world opinion.

If this world power agrees to the establishing of war zones by a nation, then war zones will be established. If it forbids them, then they will be forbidden, and to the extent of the validity of the peace pact they will not exist.

There are interests which contribute to such a peace pact. First there are all those interests usually called material interests, the interests which eventuate (to use a familiar Gallic word) in sufficient food, clothes, shelter for mankind; secondly, those interests which affect the thinking of men, for as men think so are they, and a state of peace is the only state which enables men to think freely; thirdly, those interests which affect all and every human activity. It is a plain, an humble statement to make, but when we analyze that composite we call man, we find him functioned to three things, to eat, to labor and to think. The supreme, the only excusable right of a peace pact or of a war pact is to enable man to be himself. And he is best himself when he is under the best limitations. The nation, the state, limits him for its own ends; the world, the international, limits him for its ends. Of course this conclusion, however lame or impotent, brings us to morality, to ethics, to all the difficulties in politics which have first disclosed themselves in philosophy. But the problem remains; it is part of the totality of human life. And there is quite as much reason for giving a world solution to world problems as a national solution to national problems, or an individual solution to individual problems.

If we may presume to anticipate conclusions likely to formulate themselves after the present European War is over, the nations will not abandon what gains may have been made at any time toward the securing and the maintaining of a world peace. He who breaks the moral law does not thereby destroy the moral law or the need of it. If the establishing of war zones furthers the general welfare of the whole world, then henceforth the establishing of such zones will be the lawful procedure for all nations. The belligerent of today is the neutral of tomorrow, but law is for all time. The trend of life the

world around is toward a more common, a more general recognition of morals and, consequently, a more common and more general recognition of those rules which we call international law. In this world it seems that he who suffers must make the first outcry. If nations that suffer because of the present war zone make no outcry, then silence may be construed as consent. It is because a war zone does or does not promote the general welfare that it must be permitted or forbidden by international law.

And this must be the answer to the question, "Should the right to establish war zones on the high seas be recognized and what, if any, should be the provisions of international law on this subject?"

If war zones promote the general welfare, the right to establish them on the high seas is unquestionable, and international law, on this subject, must not only permit them but enforce and protect them. The essential question here is a question of the general welfare. To promote that welfare is the supreme care of constitutional law; it is also the supreme object of that body of rules called international law.

From these considerations it follows, that, accepting the present fundamental of international law, *pares inter pares*, and the fundamental of national law, the *general welfare*, the question of the right to establish war zones on the high seas must be examined from many angles and points of approach.

The industrial, the political, the legal, the moral, as the interests (vast as they are) affect nationals, whether as belligerents or as neutrals. The question of common right of the whole world to the use of the high seas, questions of blockade, immediate and ultimate destination of commerce, right of a nation to self-defense, right of a nation or an alliance of nations to exploit a form of *kultur*; right of a nation or an alliance of nations to protest, or even to fight against the imposition of any form of *kultur* by other nations or any of them; right of the whole world to eat, to think, to labor without injury to other eaters, thinkers and laborers; the right of a powerful nation to exploit any market at the expense of another nation; the right of any nation to make the military superior to the civil authority or the civil superior to the military authority; the right of any nation, or group of nations, even inclusive of the majority of the Powers of the whole world to impose limitations not only upon the individual or the subject but upon any nation; and finally, the right of world opinion "to bridge the great gulf opening between the peoples of the world (*un abîme se creuse entre les peuples*)," the right of the civilized world to enforce

"the interests of Truth, the triumph of law (*travailler pour la vérité, et par là même pour le triomphe du droit—pro luce et jure,—combattre l'erreur, source de divisions et de haine entre les peuples, et contribuer ainsi au rapprochement des esprits*)," all this is latent in the question we are here attempting to consider.

The supreme difficulty is not in discovering the wrong to be remedied, but the remedy to correct and to prevent the wrong. When world opinion makes international law more than a rule adopted by nations, civilized states, to regulate their mutual dealings, a mere rule and not a law possessing a sanction, then and not till then can the international evils from which the world suffers be brought before a court whose sentence shall not merely resemble but even surpass in validity the sentences of national courts of justice.

The sovereignty which must determine whether or not it is the right of a nation to establish a war zone must be a world sovereignty, an organized world opinion comprising a membership able and willing to execute its sentences. In other words, the right to establish a war zone must be a truly sovereign right.

The CHAIRMAN. I now call upon the next speaker, Professor Hershey.

Professor AMOS S. HERSHEY. I should perhaps apologize for a certain amount of repetition of what has already been said and so well said this afternoon; but a certain amount of repetition seems to be unavoidable, for I found that the discussion of the war zone problem seemed to involve a certain amount of discussion of the problem of the submarine.

SHOULD THE RIGHT TO ESTABLISH WAR ZONES ON  
THE HIGH SEAS BE RECOGNIZED AND WHAT, IF  
ANY, SHOULD BE THE PROVISIONS OF INTERNA-  
TIONAL LAW ON THE SUBJECT?

ADDRESS OF AMOS S. HERSHEY,  
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# I

The question of war zones seems first to have arisen during the Russo-Japanese War. On April 15, 1904, the head of our State De-

partment received the following surprising communication from Count Cassini, the Russian Ambassador to the United States:

I am instructed by my Government, in order that there may be no misunderstanding, to inform your excellency that the lieutenant of his Imperial Majesty in the Far East [Admiral Alexieff] has just made the following declaration: In case neutral vessels, having on-board correspondents who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions, should be arrested off Kwan-tung, or within the zone of operations of the Russian fleet, such correspondents shall be regarded as spies, and the vessels provided with such apparatus shall be seized as lawful prizes.

Similar, if not identic, notes were communicated to the other Powers. Against this declaration by the Russian Government that it proposed to treat as spies any newspaper correspondents who might be engaged in the dissemination of news within a "zone of operations" on the high seas by means of wireless telegraphy, our Government uttered no formal protest, though the Russian Foreign Office was notified that "the United States does not waive any right it may have in international law should any American citizen be arrested or any American vessel be seized."

The Russian note to the Powers was provoked by the presence in the Yellow Sea and adjacent waters of a London *Times* correspondent who had chartered a Chinese dispatch boat called the *Haimun* and, equipped with wireless apparatus, was engaged in the transmission of war news in cipher to London *via* the British or neutral port of Wei-hai-wei.

It appears that the Japanese authorities also attempted to restrict the movements of the *Haimun* on the high seas and in neutral waters, though in much less drastic fashion than had been the case with Russia. During the Russo-Japanese War Japan is also said to have declared and notified a number of "defense sea-areas," some of them extending beyond the territorial waters.

The Russo-Japanese War also furnishes the first precedents for the use of submarine mines on the high seas, though there appears to have been no attempt to justify this practice on the theory of a war area or zone of military operations.

During the latter part of May, 1904, it was reported that the Rus-

sians had sown the whole strait of Pe-chi-li with floating mines. The *New York Times* for May 23, 1904, stated:

Not only have these diabolical machines been placed off their own shores and in their own waters [Russian], but it is reported that launches and junks have been sent out to drop mines at night or in fogs in waters likely to be used by the Japanese warships and transports. These mines have drifted into the high seas and Chinese waters, where they constitute the gravest danger to neutral shipping.

The prediction by experts that these mines would constitute a menace to the lives and property of neutrals after the war was only too well fulfilled.

At the Hague Conference of 1907 the Chinese delegate made the following statement:

The Chinese Government is even today obliged to furnish vessels engaged in coastal navigation with special apparatus to raise and destroy floating mines which are found, not only in the open sea, but even in its territorial waters. In spite of the precautions which have been taken, a very considerable number of coasting vessels, fishing boats, junks and sampans have been lost with all hands without the details of the disasters being known to the Western World. It is calculated that from five to six hundred of our countrymen engaged in their peaceful occupations have there met a cruel death in consequence of these dangerous engines of war.

The Russians seem to have defended their action (both in laying mines on the high seas and in threatening to treat journalists engaged in the transmission of wireless messages as spies) mainly on the ground that "everything is permissible in war except those things which are specifically forbidden by convention or international law."

An adequate reply to this argument would appear to be that in the case of any new or unauthorized interference with the rights of neutrals, and particularly on the high seas, the presumption should always be in favor of the rights of neutrals and noncombatants, and of humanity.

In order to render such acts as the declaration of a war zone and the laying of mines on the high seas lawful, they should be specifically authorized by custom or convention; for their *prima facie* illegality

may be deduced from general and fundamental principles. The sea is the common property and highway of all nations. In times of peace there is almost absolute freedom of the seas, and even during war its trade routes should be free and open to neutrals, subject to the belligerent rights of visit and search, blockade, and so forth. Even enemy merchantmen are not without their rights as common carriers on the high seas, as in the case of noncombatants in land warfare.

During the present war the submarine has been added as a new terror to the horrors of modern warfare. Like automatic contact mines, these new weapons are employed without warrant or authority on the high seas, and are used as commerce destroyers, being applied almost indiscriminately to neutral and belligerent vessels alike by the Central Powers.

The war had hardly begun before the Germans were accused by the British of laying unanchored as well as anchored mines without warning in the North Sea and on the trade route between Liverpool and America off the northwestern coast of Ireland.

On November 3, 1914, Great Britain declared that, "owing to the discovery of mines in the North Sea, the whole of that sea might be considered a military area." All vessels were warned and advised to follow one of two alternative routes indicated by the British Admiralty.

On February 4, 1915, Germany declared "all waters around Great Britain, including the whole of the English Channel" as included within the zone of war. She threatened to destroy "all enemy merchant vessels encountered in these waters regardless of all danger to their crews and passengers," and warned neutral vessels that they were also exposed to a similar danger.

It is unnecessary to rehearse here and now the damage wrought during this war by German mines and submarines. And their activity has by no means been restricted to declared war zones. The main facts are so indelibly impressed upon the minds of all of us that we could not forget them if we would. Suffice it to say that, according to a statement made recently in the House of Commons by Mr. Runcieman, the President of the Board of Trade, since the outbreak of the war 3,117 noncombatants have lost their lives in maritime disasters due to enemy mines or to submarines.

Now what is the remedy for this state of affairs? What measures should be taken, what rules and regulations adopted at the close of this war which will afford some prospect of relief from such condi-

tions or prevent a recurrence of such acts of frightfulness as we have been witnessing both in land and naval warfare? Mines and submarines doubtless have their legitimate use in modern warfare, but such use should be mainly or substantially for defensive purposes and should be mainly confined to belligerent or territorial waters. Owing to the long range of modern guns, their employment for defensive purposes should be permitted to some distance beyond the three-mile limit; and, since certain military operations on the high seas are unavoidable, a limited use of mines and submarines for purely military purposes on the high seas must perhaps be conceded by way of exception.

Experience during the Russo-Japanese and Great European Wars has, however, amply demonstrated that such military use of mines and submarines must be carefully restricted and their use as commerce destroyers be altogether prohibited.

The arguments against the use of the submarine as a commerce destroyer are well summarized in a communication which bears the signature of Mr. Bryan to our Ambassador in Berlin, dated May 13, 1915:

The Government of the United States, therefore, desires to call the attention of the Imperial German Government with the utmost earnestness to the fact that the objection to their present method of attack against the trade of their enemies lies in the practical impossibility of employing submarines in the destruction of commerce without disregarding those rules of fairness, reason, justice, and humanity which all modern opinion regards as imperative. It is practically impossible for the officers of a submarine to visit a merchantman at sea and examine her papers and cargo. It is practically impossible for them to make a prize of her; and, if they can not put a prize crew on board of her, they can not sink her without leaving her crew and all on board of her to the mercy of the sea in her small boats. These facts it is understood the Imperial German Government frankly admit. We are informed that in the instances of which we have spoken time enough for even that poor measure of safety was not given, and in at least two of the cases cited not so much as a warning was received. Manifestly submarines can not be used against merchantmen, as the last few weeks have shown, without an inevitable violation of many sacred principles of justice and humanity.

The declaration of war zones or areas of military operations within which neutral rights are seriously curtailed by mines and submarines

must also be interdicted or, if at all permitted, their geographical limits and belligerent activities therein must be narrowly circumscribed.

How may such rules and limitations be enforced? Our experience during this war has or should have convinced us that we can no longer put our trust in platonic Hague conventions, in neutralization scraps of paper, or even in good intentions embodied in arbitration treaties. There must be a hard and fast league of states, including as many of the great sea Powers as can be trusted or induced to join it, who shall incorporate a convention on this subject along with many others into their articles of agreement or alliance. Such articles of agreement may and should include agreements on many subjects beyond the scope of this paper, and beyond the scope of international law itself. It might, for example, include a guarantee of international arbitration in disputes of a juridical nature, of mediation and commissions of inquiry, etc., in case of political differences, of the rights of small nationalities, of policies such as the Monroe Doctrine, of the Open Door in China and elsewhere, and of the fundamental principles of international law. But among these matters of greater moment, it must find place for a convention on war zones and the use of mines and submarines. And this league or alliance must be ready and willing to order execution against any nation or government guilty of violating such rules, regulations, or articles of agreement.

The CHAIRMAN. The question entitled "Should the right to establish war zones on the high seas be recognized and what, if any, should be the provisions of international law on this subject?" is now open to such discussion as any of the members may care to make.

Professor PHILIP MARSHALL BROWN. Mr. Chairman, I hardly venture to attempt to deal with the subject that Mr. Hershey has treated so definitely and concisely, but it has suggested to me a very vital thought that has been going through my mind during these discussions; that we are appealing to a definite law of neutrality to safeguard neutral rights. It seems to me that the very subject under discussion tonight, the question of war zones, should indicate to us that there are subjects not treated definitely by any law of neutrality, and that in every war there will be unexpected developments, as belligerents in taking effective measures against each other are bound at times of necessity, as a part of the strategy of war,

to utilize new methods of warfare and new devices; and as war becomes increasingly scientific, efficient and comprehensive, new features of war will necessarily be developed. So it seems to me it would be fundamentally an error for any of us who are concerned with the welfare of international law to dare to state that in any war there may not be these developments. It seems to me we want to go much further than that, and to remember that a great war is a great conflagration. The neutral who is concerned about his own selfish interests can not plead those interests as absolutely superior to any other interests. Not only that, he must be prepared to recognize that in the efforts of other members of the family of nations to suppress a great conflagration it will be necessary for them to affect his interests as a neutral directly. I personally have reached the point where I can not with any patience approve of the idea that neutrals are in a privileged position; that when the rest of the family of nations are in the throes of a ghastly struggle, a neutral can plead his selfish individual rights as against the interests of the belligerents who are struggling, through this ghastly form of litigation, to put an end to their difficulties. I recall at this moment some tourists whom I met at The Hague in 1914. Their remarks were to this effect: "Isn't it annoying beyond measure that this war should have arisen? We had our plans all made for going into Russia, and we had such a wonderful trip planned. It seems to me that this horrible war has no justification at all to interfere with the rest of mankind and with the interests of the world!"

Now, really, it seems to me that that is not an unfair parallel. Are not neutrals taking about that position when they claim, in many such respects, certain rights as against the rights of belligerents? I myself can not recognize any great body of law governing neutrality. We have used these expressions a good deal during this discussion—an appeal to the law of neutrals. If those of us who are particularly interested in this subject will stop a moment and ask definitely what body of laws neutrality has to appeal to, I think we will find it extremely difficult to answer.

Prior to 1793, if you will consider the French ordinances, for example, you find there a mass of inconsistencies in regard to usage and practice. Washington endeavored to crystallize something definite in neutrality; but certainly the nineteenth century saw the most extraordinary application of neutrality in the different wars of that century. We ourselves in the Civil War developed an exceptional practice in

regard to neutral rights, notably in the *Springbok* case and others which has been adapted and extended in the present war. The Declaration of London is of no value in this war. It has been cast aside by the different belligerents, and even the United States has said it is not bound by it.

So it seems to me we want to be on our guard, in discussing this question of neutral rights, against the idea that we have a definite body of rules to which we can appeal. It seems to me that the neutral must recognize that the supreme law in neutrality is the law of the belligerent, and that neutrals will have just such rights as may be conceded to them by the exigencies of the situation, by the demands of humanity, and by the consideration which belligerents must show to neutrals in order to avoid participation in the war. In other words, the neutral nation ought to be satisfied that it is out of the struggle. If it finds any satisfaction in that negative attitude, I confess I do not find much to approve in it. We are reaching the point in international affairs where we are bound mutually to recognize our obligations to one another, and if there is an international disturbance, if the nations of the earth are endeavoring to restore order and peace, if a neutral finds that it is unable to participate in that beneficent work of restoring order, it seems to me it should be satisfied at least in that it is not drawn into the actual disasters and into the sufferings of war.

Speaking extempore in this way perhaps I have used expressions which are not scientific or exact, but they are expressions that have been evoked since we have had discussion, particularly by the papers tonight. The question of war zones alone indicates the fact that neutrality in itself has yet to be clearly defined; and our interest, it seems to me, as a neutral, is not so much in defining the rights of neutrals as in trying to find some means of protecting the rights of the whole family of nations in times of peace, and not in times of war.

President HARRY PRATT JUDSON. Mr. Chairman, the speaker who has just taken his seat has laid down a rather dangerous proposition. It seems, if I understand it, that neutrals have no rights whatever, that belligerents give the law to the world, and that the long struggle for the right of neutrals is wasted; that each belligerent nation has a right to do what it pleases in its treatment of the others; in other words, that in time of war there is no international law, and that every belligerent is free to treat the world as it will; that if we see fit to join the war,

well and good, then we too share in putting on the world our own will, but as long as we do not see fit to join the war, that we have no rights; we can simply be happy in the fact that we are not fighting, and let each belligerent do with us what its own sweet will dictates. I believe this is wrong, and that there are rights which neutrals have in time of war if they do not see fit to join in the war, and that those rights are marked out by rather definite principles. There are not very many principles, but they are settled, and we ought to stand by them.

I believe these war zones are preposterous intrusions on the right of neutrals. That is to say, they are simply an attempt to enforce on the high seas rights that do not exist. A belligerent may do in his war zone anything that by law he may do on the high seas, but he has no right to do in that war zone anything that by law he has not the right to do anywhere else on the high seas.

It is not always easy to define technical rights. More than a century ago we had trouble to define our rights on the high seas, and finally we had to protect them by becoming belligerents ourselves. We may have to do the same thing in this case. Nevertheless, during that long struggle between France and Great Britain our Government insisted that certain things done by belligerents were contrary to law, and in 1856 our principles were adopted by the concert of nations and became law; they are law today, they recognize neutral rights to a certain extent, and those rights we have. In other words, it seems to me that neutrals ought to use what power they can to maintain every last right they have extorted by long and serious and difficult means from belligerents. That is the history of international law. It is not easy to get those rights, and it is not easy to maintain them, but if you abandon them, you abandon all international law; and international rights in time of peace become futile, because war can come at any time and destroy them. And that is something I do not believe.

Mr. FREDERIC R. COUDERT. Mr. Chairman, I confess I was very much interested in the apparently novel and, as it seems to me, very sound and interesting remarks of my friend, Professor Brown. He did seem to me to deal actually with reality. He seemed to have his hand upon realism, and not to be dominated by mere vague theories and the mists of philosophy. I take it that we are in danger of becoming somewhat confused because we deal with words rather than

things, and because we do not always think in terms of actualities. I take it that the present situation is so extraordinarily anomalous, so exceptional, that to apply to it the ordinary canons of everyday law and everyday history will lead us into positions that are absurd; and when we reach positions that are absurd and counter to morality and common decency, evidently we have been following wrong theories. It seems to me it is the old discussion that we have been having in this country for the last ten or fifteen years between legalism and real right and honesty and decency, and that it goes down very deep indeed. Some time ago I had an illustration of this question. All wrong is an infraction of law. Of course it is. I had an excellent Scotch nurse who happened to take my baby to the park in his perambulator. They went into some forbidden sanctum on the grass, and the policeman promptly reprimanded the nurse and threatened her with arrest. She was duly and properly indignant and angry to think that infants should be excluded from anything that was good and healthy and green and nice, and when she returned she explained to me the serious situation in which she had found herself, and asked me to make a complaint against the policeman. I had to explain to her in a lengthy discourse that after all she was an outlaw, that she had violated the law, that she was in exactly the same position as a common murderer, and of course entitled to no protection whatever from me. Of course she had violated the law, and she was outside the law, but my logic quite failed to convince her. So indeed we consider violations of international law as a kind of general intellectual concept, without thinking what they are. Do they deal with extensions of theoretical doctrines of "ultimate destination," or do they in the concrete consist in the slaughter of babies on the high seas? Perhaps, theoretically, the neutral is equally interested in maintaining them all, but of course the common man in the street who is endowed with a good deal of common sense, which has not been obfuscated by reading too many books, can see that there is an essential difference. The ordinary man knows that there is a tremendous difference between a technical infraction of law, like the catching of a fish the day before the season opens, and hideous things, like the murder of women and children, that go to the very basis of human society. The question is not as to the possible particular violation of international rights in a particular case, over which judges may differ and lawyers may split the Supreme Court, but whether there is

to be any international law at all or not. The interest of the neutral, as Professor Brown has so felicitously put it, is in maintaining a position which is consistent with the existence of international law for the future; not in slapping first at the nurse with the perambulator and then pouring equally burning words of imprecation upon an unutterable murderer, because that does not get the neutral anywhere except to make him more or less discreditable, however much he may becloud the issue in rhetoric. The question is whether there is any international law, or whether the fundamentals of it have been destroyed; whether the whole great underlying system of international law, usage and convention has been violated. In a world which has become anomalous, and in which only one great neutral remains, it seems to me that neutral has a simple and straightforward duty, not merely to protest equally against every violation of international law, not to treat the occasional rifling of a mail bag as it might the destruction of a great neutral nation like Belgium, but to stand resolutely on some fundamental proposition and to say that in a whole world that has gone to war there must somewhere or other be right, and wherever that right is found, that right we must sustain. We can not say that that right is not a one hundred per cent right. It may be only ninety-nine or ninety-eight or ninety-three per cent right, but that there is a basic, dominant, fundamental right somewhere, and where that dominant right lies, there international law and international morality and decency lie; and the neutral must align itself with that and stand up for it manfully; not merely whine piteously, whether its pocket is pinched, or its handkerchief abstracted, or whether its citizens are killed. There comes a time when to a great nation continued neutrality means abandonment not only of rights but also of duty. The whole situation is anomalous, and extraordinary, and the attempt to apply mere book rules, apart from the situation, and without a realization of it, is merely abstract reasoning purely in *vacuo*.

The CHAIRMAN. After this expression of opinion by Mr. Coudert, which certainly is not to be found in the books, does any one care to continue the discussion further, to ascertain where this non-existent right lies?

Mr. EDWARD C. ELIOT. Mr. Chairman, it seems to me that Mr. Judson is right. For several hundred years there has been

a steady development of principles, which we call principles of international law. Those principles have received the approval in the main of civilized countries up to this time. It is true that they are not certain in all respects, and that there are ambiguities in connection with the subject, which we would like to resolve, but, nevertheless, there is a body of law which is entitled to the designation of international law, and which had, up to the beginning of this war, been generally received by civilized nations as binding upon them.

Now that being the case, it strikes me that it is preëminently the duty of all neutral countries, which stand at the side of this great contest, to examine with care the situations which seem to involve breaches of those principles, and to make their opinions perfectly clear upon such matters. The subject for this evening presents a question which, it strikes me at once, is naturally and easily answered. Up to this time the seas have been open. Since the great discussion upon that subject in the time of the Stuarts, the doctrine has been fully developed and stands recognized that outside of territorial waters the open seas are free to the vessels of all nations, and that the citizens of all countries have rights there, the rights of peaceful citizens. Where they are within those rights they ought to be protected.

The question before the Society this evening, that of war zones, is answered at once by the proposition that the seas are open. There is no right on the part of belligerents—at all events none has been recognized of late years—to close any portion of the waters of the ocean or to exclude neutrals therefrom. The answer, therefore, to the question that is put to us tonight I think ought to be "No." The general and philosophical discussions of the subject along the lines last suggested by gentlemen here are really out of the case. We have a definite law of the seas that has been recognized, and we ought to stand by it and do what we can to maintain it.

The CHAIRMAN. Is there any further discussion? There are many here tonight who have views on this question. It would be invidious to single out any, and in order to prevent that, Mr. Andrews rises.

Professor ARTHUR I. ANDREWS. I may make a remark as radical as any that has been presented here.

The CHAIRMAN. I doubt it.

Professor ANDREWS. I teach my classes that there is a good deal of common sense in international law, and I am going to appeal not only to precedents and to abstract justice and equity, but I am going to appeal to common sense. I do not quite understand the war zone perhaps in the way that it has been presented, but I certainly think the war zone has come, and is likely to stay and to be expanded. That does not mean that it is necessary for the war zone to be as horrible a thing as some of us might think at first. I might almost say that the question of its existence has been settled, and that it has been accepted. It has been accepted for two or three years in some courts in this country. Quotations have been made, and I am going to quote from a recent discussion at one of our prominent institutions, a few years ago, which I think has a bearing on the case. I beg the pardon of those who are already familiar with it, but it seems to be pertinent here. After discussing the fact as to the war zone—referring to the extension of the Russo-Japanese War zone, these statements were made:

The practice, nature of regulations, and drift of opinion seem to show that in time of war a belligerent is entitled to take measures for his protection which are not unreasonable.

That seems to me in the line of common sense.

Certainly he is entitled to regulate the use of his territorial waters in such a fashion as shall be necessary for his well being. Similarly a belligerent may be obliged to assume in time of war, for his own protection, measurable control over the waters which in time of peace would be outside his jurisdiction. It is universally admitted—

This is another place which sounds rather like common sense—

that if a neutral is carrying contraband to his opponent, a belligerent may take the vessel to a prize court for adjudication. For such an act the course of a vessel may be changed, and it may be subjected to long delay. Would it be unreasonable to contend that the course of a vessel might be changed to keep it out of a specified area because it might there obtain information which would be of vastly greater importance to the enemy than a cargo of contraband, however noxious that might be?

There are reasons which will naturally occur to any one of you, just as strong reasons why a vessel might be delayed. Now I should like to have us proceed somewhat on the analogy of the blockade. Earlier in the evening a suggestion was made along that line. We might start to regulate war zones first by saying that a war zone in order to be legal must be effective. It must be definite. That I think is about what the first speaker said. In the future a war zone should be allowable, provided the rights of neutrals should be respected. Personally I think we might proceed in the further discussion along the lines of the blockade, and perhaps we will get somewhere near agreeing on regulations which we would recommend for the war zone of the future.

Admiral COLBY M. CHESTER. I had no intention of coming here to take part in this discussion tonight, but the Chairman has asked me to say a few words, and I never lose an opportunity, if I have it, to say something for the Navy.

I agree with what Professor Brown has said, that there are a great many questions that will have to be answered in the future that we do not know anything about at the present time, and that international law has not been brought up to date by any means. For the last twenty-five years we have been trying to bring the laws up to date, to meet the modern conditions of warfare, but they have not been codified on account of the fact that different nations were affected in different ways, and they could not harmonize on an agreement as to what the present international law provisions should be.

We all hope that one result of the terrible catastrophe that has come to Europe will be to bring about a new condition of things, but we can not hamper ourselves by making decisions now that will prevent our reaping the advantages which modern conditions have given to us, decisions that we may want to reverse when we are interested participants.

As for the matter of territorial waters, I do not believe anybody in the world knows what will be the definition of territorial waters. We speak of the three-mile limit, but that has long gone by. At the present time the territorial waters over which a nation holds control by gun-fire extend in many cases miles and miles beyond the three-mile limit, and in the future we shall have a territorial zone that will probably be something like twenty miles from the shore. Take the south coast of

Cuba, for instance. The Cuban Government exercises jurisdiction over an area covering sixty or seventy miles off the coast. The three-mile limit could not be regarded as a boundary for a war zone on that coast, and it can not be so taken in very many other places.

I should like to tell you a little story of a rather sad experience that I once had which may have a bearing on the armed ship question that you discussed here this afternoon. I want to say that I have been cruising around the world for fifty years, and I have never been on a foreign station in my life when war was not going on in some part of the station to which I was attached and many of these questions have been handled by officers of the navy in a practical way a great many times.

Just before the late Spanish War it was my misfortune to be sent to the coast of Florida to protect the Island of Cuba against filibustering expeditions fitted out in Florida. We were not told what a filibusterer was, and I do not believe anybody can define a filibusterer now. I was sent to blockade the port of Jacksonville to keep two well-known filibusterers from coming out. They were two small tug boats, the *Dauntless* and the *Three Friends* which had been bonded to five times their value to make them keep the peace, but still they kept carrying arms to Cuba. Finding that arms were still going to Cuba, the President of the United States finally sent me another ship to help maintain the blockade and said that if I did not stop the filibustering he would take me out of my command. But a ship had a perfect right to go loaded with arms, from Jacksonville to any port in the world. She could take five thousand stand of arms and five thousand men and uniforms for them, but unless we could find the ship at a time when she was engaged in landing arms, or with men with arms in their hands we could not declare that she was a filibusterer. She had a perfect right to carry on legitimate trade, just as we have now, and to maintain her rights.

The filibusterer was a very wily member of society, and when we chased her out to sea she would run for the Bahama banks and anchor in three or four fathoms of water, while the blockader would have to stay off in a hundred fathoms of water, until our coal gave out and we were forced to seek a port, when she would go and land arms on the Cuban coast. I was thus left in a delicate position. I did not want to be taken out of my command. Finally the *Three Friends* came out from Jacksonville one day and the captain said he wanted to go

out and tow in a vessel that was out in the offing. That was his business. He asked me to let him go. I said, "No. You go back into port." He said, "I have a perfect right to go." I did not doubt this, but said, "You go back into port." He started off a little way and then came back and said, "Will you give me a certificate that you have stopped me from carrying on my legitimate business on the sea?" I said, "No, I will not give you the scratch of a pen. When you get an order from the President of the United States authorizing you to come out, you can go anywhere you please, but until you get that order you can not leave the port." He went back into port. Now, under the law I was compelled not only to give him a certificate, but to register the fact on his manifest. Had I done so, however, he would have secured an injunction from the civil court at Jacksonville against my interference with his legitimate business, as was done later with another ship-of-war, and thus have broken up the blockade. I disobeyed the law in order to keep myself from punishment, and in that way we kept him in port. After my ship had been withdrawn from the blockade, this vessel got out and carried a load of arms down to Cuba.

When the *Three Friends* finally made her escape a correspondent of a New York paper wrote a story about her, illustrated with a picture showing the little tug boat, with a six-pounder gun mounted on her stern. In a two-page article he described the first battle fought between the Cuban patriots and the Spanish navy. Another illustration was a purported copy of a photograph showing a big Spanish frigate sinking by the stern, with men in the water drowning, although, as he said, it was on a dark night when you could not see your hand before you. The correspondent told how the vessel finally reached one of the Bahama Keys which he called "No Name Key," and where he said that the crew suffered great hardship owing to the cruel treatment the officers of the navy subjected them to. Here they became so weakened, that one day an alligator came up on the shore and ate two of the men alive. This pathetic story appealed to the public very much. The United States District Attorney for the Southern District of Florida had been trying to make out a case against this vessel for a good many months, and he thought that if he could subpoena the correspondent before a civil court and get him to testify that this little tug boat had a six-pounder gun mounted on her as shown by the photograph which had been published, the tug could be declared

an "armed vessel," and then we could seize and condemn her and end all our troubles. The District Attorney finally got him on the witness stand in the civil court and asked him what his profession was, to which he replied that he was a professional filibusterer. The District Attorney then asked him if the story was true that he had written for the newspaper, and he said that some of it was true and some of it was not. He then said, "Tell the court what was true and what was not." He said "No, I will not do that. That will incriminate myself." He could be examined no further.

After the witness had retired from the witness stand he turned to the judge and said, "Judge, I presume you read that story of mine." The judge said he had. He then said "Did you believe it?" "Well, I had to take some of it with a grain of salt." "Did you take in that yarn about an alligator coming up on the shore and eating two men alive?" "Oh, that was rather fishy." "Well," ended the correspondent, "nobody but a fool would believe such yarns, and yet I make my living by publishing those stories in the newspapers. The American people want them and the papers want me to write them."

The point is that if we could have established the fact that the *Three Friends* had a gun of any kind mounted on her, or if we could have caught the vessel with one man with a weapon in his hand, we could have carried her into court and condemned her as a filibusterer, and under the neutrality laws of the United States the vessel would have been condemned and sold, and the filibustering would have been stopped.

The CHAIRMAN. Is there a desire on the part of any member present to discuss further the question of the right to establish war zones on the high seas, with or without law?

Professor GEORGE G. WILSON. The subject of war zones has perhaps in part escaped our attention. There are various kinds of war zones. There were war zones established during the Russo-Japanese War, which were recognized as perfectly valid war measures, by all people in the world who were concerned. Those war zones were established as much for the benefit of neutrals as for the benefit of belligerents. There are certain areas where the belligerents are carrying on operations, and within those areas it is dangerous for neutrals or for private vessels of the belligerents to enter. It is entirely proper

that the belligerents should specify those areas in order that there may be no undue risk taken by the vessels going into them. In time of war we limit the actions of belligerents and neutrals. We do that by blockade, by seizing contraband, and by limiting the action of vessels that are supposed to be engaged entirely in unneutral service. We do not allow the radio to operate within certain areas, because there would be great risks to belligerents if the radio were operated within those areas.

Now there are certain perfectly legitimate things which may be done or may be forbidden in a given area. Therefore we may be talking about two very different things. There may be legitimate action within the war area, in the same way that there may be a legitimate blockade, and a blockade that is not legitimate. We say a blockade that is not legitimate is a blockade that is not effective. Japan established a war area, or a strategic area as it is sometimes called, in order that there might not be on the part of neutrals interference with the plans of the Japanese navy in certain specified neighborhoods, near fortifications and the like. There had been mines placed in some of those areas, and the placing of mines, if definitely described and specified, in an area from which neutrals are excluded, is an act which is regarded by the Hague Convention as entirely and perfectly legitimate. So it is necessary for us to consider practically the facts in these matters, and to realize that for the benefit of neutrals and belligerents alike there is reason for the establishment of certain strategic and war areas.

If I may be pardoned, like the others, for speaking upon a matter that is not directly under consideration, I would like to leave a little more optimistic tone in this discussion in regard to the disappearance of international law. As I think one of the speakers here was reading from something upon international law as related to war zones for which I shall have to assume responsibility. I should hate to have that considered as of no value at the present time. Nearly every one who has been concerned with international law in the last few months has probably been greeted by friends with condolences of various sorts as to his possible future, as to whether he was planning to undertake some new form of occupation, in view of the disappearance of international law. Professor Moore, who has some standing in international law, reported that his friends had been treating him to similar doleful remarks recently. Now international law has not disappeared, nor has its force entirely disappeared. The fact

is that practically every belligerent has been rushing into print, and has been deluging our mails with material, with printed matter of various sorts, endeavoring to show to us that it has particularly and faithfully followed the tenets of international law, or if it has not, that it will as soon as possible make good for the violation of international law. That printing was not undertaken purely as a philanthropic work. It was undertaken in order that the people of the world might recognize that these states have still some respect for that which we call international law.

The decisions of the French prize courts have followed international law very strictly. The decisions of the German prize courts, so far as I have been able to get hold of them, have likewise followed and recognized the principles of international law. The British have within a week announced that if orders issued by the King in Council were found by the court to be in contravention of international law, international law was to be followed; and if the courts of Great Britain are to follow international law, and the courts of France and the courts of Germany as well, and if all the belligerent states are appealing to international law as the justification for their acts, it certainly still has some standing in the world, and this Society will not yet need to disband. Further, when it comes to the final settlement, the problems of this great war must, if permanently adjusted, be adjusted under the principles of international law.

The CHAIRMAN. Is there a further desire to take part in the discussion?

Mr. CHARLES HENRY BUTLER. Before we adjourn I should like to make a formal motion. I may not be here tomorrow to make it.

I thoroughly agree with my friend, Professor Wilson, that international law is not dead. For that reason I shall ask the Society to continue the Committee on Codification, which has not been able to make a report at the present time; and, as the membership of the committee includes gentlemen who are absent engaged in discussing matters involving international law, we have not been able to have any meeting in order to codify the entire law; but we expect to do it, or at least to some extent. It will be a very long and difficult task, but we hope that step by step this committee can report to this Society from time to time; and while it may not be able to produce a complete code of

international law recognized by all nations, still if we can define from time to time some of its principles, it will be a great thing, and we will not only be of service to other nations, but be of some service to this nation and to the people who are interested in preserving this great branch of jurisprudence.

There is one thing in regard to this question of what international law is which applies in the same way to all other branches of jurisprudence, international, national and municipal. There is no fixity about it, in my opinion, any more than there is fixity in the application of the principles of municipal law or national law. Occasions will arise which are different from former occasions, and the question of the application of the same principle will constantly come up. There may have to be extensions of the principles or modifications of them. Take, for instance, the construction of the Constitution of the United States. When we speak of the law as established by the Supreme Court of the United States we regard it as nearly fixed as law can be, and yet on more than one occasion the Supreme Court has seen fit to reverse itself. In the case of the *Thomas Jefferson* (10 Wheat. 428), the Supreme Court decided that the admiralty jurisdiction of the United States did not extend to inland waters. Yet a few years afterwards, in the *Genesee Chief* (12 How. 443), the same court solemnly declared that it had made a mistake, and that the whole safety of the commerce of this country depended upon the Federal Government taking under its admiralty jurisdiction the control of the inland navigable waters. Now where would this country have been if the Supreme Court had not had the strength to say that it had erred in that respect? The Supreme Court had decided that the ebb and flow of the tide was what should control admiralty jurisdiction, but they saw where that led, and so they reversed their former decision. In the same way we may take a principle of international law as it may have been applied on a few occasions heretofore. A nation now struggling for existence sees that that principle can not be applied in the way that it has been heretofore. Are we, when we are at peace today, to say that there is a fixity in that principle which can never be changed? Are we to try to establish the principle that because a blockade zone has been limited in former wars to so many miles, it can not now be extended when a new instrument of warfare, whether it be a submarine or some electrical appliance, is invented, and that such new appliance can not be used because, forsooth, it was not used during our Civil War? Do we want to

tie ourselves up with a declaration of fixity which when the occasion arises may be quoted against us, so that they may say, "In 1916 you solemnly declared that the manner of application of these principles forever stood the same."

I am not prepared to discuss exactly how far a war zone should extend, but I do say that this country should be very careful how it establishes the principle that there can be no extension either of belligerent rights or of neutral rights which may be necessary to preserve our national life when the occasion arises.

Now, Mr. Chairman, I merely rose to ask, and I now ask, that the Committee on Codification may be allowed to report progress and be continued another year, and that it may report at the next meeting.

The CHAIRMAN. If there be no objection the report will be received and the committee will be continued. There seems to be no objection. The report is received and the committee is continued.

There being no further business before the meeting, it stands adjourned until tomorrow at 10 o'clock a.m. in this room.

## FIFTH SESSION

Saturday, April 29, 1916, 10 o'clock a.m.

The meeting was called to order by Dr. HARRY PRATT JUDSON, President of the University of Chicago.

The CHAIRMAN. The first order of business is the report of the Standing Committee on the Study and Teaching of International Law and Related Subjects. Professor George Grafton Wilson, of Harvard University, is Chairman of the committee.

Mr. JAMES BROWN SCOTT. Mr. Chairman, I rise to make a slight suggestion as to a change in the proceedings. Would it not be well, before beginning the proceedings this morning, to entertain a purely formal motion, namely, for the approval of the minutes of December 30, 1915, which have been circulated and which have presumably been read by the members?

If there be no objection I move, sir, that the minutes, as printed and distributed, of the meeting of the Society, of December 30, 1915, be approved.

The CHAIRMAN. If there is no objection to the approval of the minutes as printed and distributed, it will be so ordered. The Chair hears no objection and the minutes stand approved.

Professor GEORGE G. WILSON. These reports of the committee have just come from the printer so they may contain some slight typographical errors. This matter is of such importance that it would seem advisable to give very careful consideration to it, because it will be regarded in the educational institutions throughout the country as a pronouncement of the Society upon the teaching of international law and related subjects.

There are certain principles here enunciated. Whether this Society will be in accord with the principles enunciated by this committee is for the Society to say. (Reading):

Of the sixteen resolutions and recommendations adopted by the Conference of Teachers of International Law and Related Subjects at the meeting on April 23-25, 1914, nine were referred to the Standing Committee on the Study and Teaching of International Law and Related Subjects. This Committee was appointed under Resolution No. 1, and consists of:

*Chairman*, Professor George Grafton Wilson, of Harvard University.  
 Professor Philip Marshall Brown, of Princeton University.  
 Professor Amos S. Hershey, of Indiana University.  
 Professor Charles Cheney Hyde, of Northwestern University.  
 President Harry Pratt Judson, of the University of Chicago.  
 Honorable Robert Lansing, Secretary of State.  
 Professor Jesse S. Reeves, of the University of Michigan.  
 Mr. Alpheus H. Snow, of Washington, D. C.  
*Secretary ex officio*, Mr. James Brown Scott, Recording Secretary of the Society.

The resolutions referred to this Committee were Resolutions numbered 3, 4, 6, 7, 10, 12, 13, 14 and 15.

Before considering the special resolutions it may be said that the Committee is agreed in the opinion that no attempt should be made to standardize instruction in international law and kindred subjects. Particularly as compared with other subjects the qualifications of instructors are unlike and the resources of institutions vary. The aim should be to improve, strengthen and make more general and comprehensive all such work by whatever means this may be possible. In general the broad nature of these subjects of study should be kept in view and the fundamental principles involved should be emphasized.

The Committee is agreed that every possible effort should be made to avoid an impression that there may be a short method for the mastery of the principles of international law or the material of related subjects.

For this reason the Committee wishes to emphasize the need of adequate and systematic training conducted in a scientific manner and without partisan or other prejudice.

Those are the general pronouncements. If there is no discussion upon them, we can proceed to the more special phases.

The special resolutions referred to the Committee may be found stated in full on pages 69-74 of the Report of the Conference of American Teachers of International Law, April 23-25, 1914.

#### RESOLUTION NO. 3

*Resolved*, That, in order further to increase the facilities for the study of international law, the Conference recommends that steps be taken to extend the study of that subject by increasing the number of schools at which courses in international law are given, by increasing the number of students in attendance upon the courses, and by diffusing a knowledge of its principles in the community at large, and, more particularly:

(a) That, as the idea of direct government by the people grows, it becomes increasingly essential to the well-being of the world that the leaders of opinion in each community be familiar with the rights and obligations of states, with respect to one another, as recognized in international law. Hence it has become a patriotic duty, resting upon our educational institutions, to give as thorough and as extensive courses as possible in this subject.

(b) That a course in international law, where possible, should consist of systematic instruction extending over at least a full academic year, divided between international law and diplomacy.

(c) That prominent experts in international law be invited from time to time to lecture upon the subject at the several institutions.

(a) While recognizing the gratifying increase in instruction, an investigation seems to show that there are great differences in the conditions under which instruction in international law and kindred subjects is carried on throughout the United States. Students are seeking institutions offering satisfactory courses on these subjects. There is particularly in consequence of recent changes a growing interest in international affairs. Educational institutions desirous of meeting the demands are accordingly providing courses upon international law and international relations; but the Committee is of the opinion that the importance of the subject in general merits a much greater development.

(b) A course of instruction of one year divided between international law as a system of law and the application of its principles in international relations is regarded as a minimum. Experience seems to show that better results are obtained by consecutive rather than by concurrent study of these subjects when only one year is possible, *i. e.*, a half-year of international law followed by a half-year of international relations rather than a division of the periods in each week between these subjects. Where it is not at present possible to give adequate courses in international law and international relations, more attention should be given to diplomatic history. Where possible, a full year or more should be given to each subject.

I think it will be just as well to discuss these as we go along rather than to come back to them, as the report is somewhat long.

Professor KARL F. GEISER. If you had one year to give in the combination, as suggested, the first semester in international law and the second semester either in American diplomacy or international relations, what would you make the second semester of the two?

Professor WILSON. As a personal opinion and not an expression of opinion by the committee, I should say at the present time, international relations, because it is the broad field of international relations that is taking the attention of the people of the world just now, and upon which information should be spread. There might be a difference of opinion and some might prefer American diplomacy.

The CHAIRMAN. Is there any further discussion?

Mr. SCOTT. I would like to make a remark at this point. The question incidentally arises whether you are considering international law as a system of law or as a philosophical system based upon ethical considerations or upon diplomatic negotiations. If an agreement is not reached upon the nature of international law, there will be difficulty in the method of study or in prescribing the courses of study. If international law is in reality a branch of jurisprudence, it should be treated as such; and if we believe, as this Society professes to believe, in the promotion of foreign relations upon the basis of justice, it would seem that we should state that in our opinion international law is and is therefore to be treated as a branch of jurisprudence and express the hope that the principles of international law be gradually pushed across the national boundary into the international field. In other words, we should try as best we may to secure the incorporation of these principles into the practice of nations. If that view be correct, it would seem to follow, as Professor Wilson has said—and I merely express a personal opinion, following his precedent in this matter—that a grounding should first be had in the principles of international law, and that then a course in international relations should follow; or, if it be impossible to have the two courses in any one institution, preference should be given to the fundamental principles of international law upon which any reasonable system of foreign policy must of necessity rest.

As there may well be a difference of opinion on this subject, I have taken the liberty of expressing my personal views. I hope that there will be a free discussion as in the multitude of counsel there is wisdom.

The CHAIRMAN. I am sure the committee will be delighted, and I speak for the Chair and not for the committee, now, with the fullest and freest expression of personal views by the members of the Society here. It is very important that this report should receive careful consideration. Are there any further remarks on this point? If not, the chairman will proceed.

Professor WILSON. I might add one further remark. There is this much to be said generally, that there is very little opportunity for a student to obtain knowledge of international law except through

a systematic course. He might get some knowledge of American diplomacy and international relations, but not necessarily of international law through general outside reading and through conversation and the like. Therefore, if only one course is to be given, it should be a course in international law, because the student would get information he would not otherwise receive. He certainly would not receive it from the newspapers.

Professor WILSON (reading):

(c) In order that there may be full value in the occasional lecture or course of lectures by an expert introduced from without the institution, every effort should be made to make such lectures a part of the systematic work of the student, for which the student shall be responsible as for other lectures in the course, and in some instances students should have special preliminary training in order to gain from the expert all that may be possible. Such lectures, if worthy of introduction, should be scientific and should not be made additional work or optional, but an integral part of the course. This point of view is essential for the student and stimulating to the lecturer.

It is suggested that in many sections of the country a course may be given in one or more institutions by a lecturer or instructor from a neighboring institution, or several institutions may coöperate in securing a non-resident lecturer for definite periods.

You will observe that it is the purpose of the committee that the additional work shall be strictly academic and a systematic part of the course in international law. There are at the present time a great many organizations throughout the United States offering to give lectures by persons who represent certain elements in the community who are anxious to propagate this, that or the other line of belief. It is not the purpose of the committee to lend this Society to the propagation of anything except international law.

I will say that there are available funds sufficient partly to defray the cost of carrying out this recommendation of the committee. The institutions that are willing to coöperate will be able to avail themselves at a very reasonable rate of the services of such lecturers and instructors.

(Reading):

#### RESOLUTION NO. 4

*Resolved*, That, with a view of placing instruction in international law upon a more uniform and scientific basis, the Conference makes the following recommendations:

(a) In the teaching of international law emphasis should be laid on the positive nature of the subject and the definiteness of the rules.

Whether we regard the teaching of value as a disciplinary subject, or from the standpoint of its importance in giving to the student a grasp of the rules that govern the relations between nations, it is important that he have impressed upon his mind the definiteness and positive character of the rules of international law. The teaching of international law should not be made the occasion for a universal peace propaganda. The interest of students and their enthusiasm for the subject can best be aroused by impressing upon them the evolutionary character of the rules of international law. Through such a presentation of the subject the student will not fail to see how the development of positive rules of law governing the relations between states has contributed toward the maintenance of peace.

(b) In order to emphasize the positive character of international law, the widest possible use should be made of cases and concrete facts in international experience.

The interest of students can best be aroused when they are convinced that they are dealing with the concrete facts of international experience. The marshaling of such facts in such a way as to develop or illustrate general principles lends a dignity to the subject which can not help but have a stimulating influence.

Hence, international law should be constantly illustrated from those sources which are recognized as ultimate authority, such as: (a) cases, both of judicial and arbitral determination; (b) treaties, protocols, acts and declarations of epoch-making congresses, such as Westphalia (1648), Vienna (1815), Paris (1856), The Hague (1899 and 1907), and London (1909); (c) diplomatic incidents ranking as precedents for action of an international character; (d) the great classics of international law.

(c) In the teaching of international law care should be exercised to distinguish the accepted rules of international law from questions of international policy.

This is particularly true of the teaching of international law in American institutions. There is a tendency to treat as rules of international law certain principles of American foreign policy. It is important that the line of division be clearly appreciated by the student. Courses in the foreign policy of the United States should therefore be distinctly separated from the courses in international law, and the principles of American foreign policy, when discussed in courses of international law, should always be tested by the rules which have received acceptance among civilized nations.

(d) In a general course on international law the experience of no one country should be allowed to assume a consequence out of proportion to the strictly international principles it may illustrate.

While at present no attempt to standardize the instruction in international law is made, the following recommendations are approved:

(a) In the teaching of international law emphasis should be laid on the positive nature of the subject and the definiteness of the rules.

(b) In order to emphasize the positive character of international law, the widest possible use should be made of cases and concrete facts in international experience.

(c) In the teaching of international law care should be exercised to distinguish the accepted rules of international law from questions of international policy.

(d) In a general course in international law, the practice of no one country should be given weight out of proportion to the strictly international principles it may illustrate.

As to the method of carrying out these recommendations there is wide difference of opinion. A pronouncement by any government does not necessarily follow international law and should be the subject of careful consideration, not only in order that we may know the facts of our own and other governmental action, but also in order that the errors and misapplications of international law may not at times be perpetuated.

#### RESOLUTION NO. 6

*Resolved*, That it is the conviction of this Conference that the present development of higher education in the United States and the place which the United States has now assumed in the affairs of the society of nations justify and demand that the study of the science and historic applications of international law take its place on a plane of equality with other subjects in the curriculum of colleges and universities, and the professorships or departments devoted to its study should be established in every institution of higher learning.

That the United States has a position among the nations making a knowledge of international law essential to intelligent leadership is clear, and the report under Resolution No. 3 is aimed to realize the proposals of Resolution No. 6.

#### RESOLUTION NO. 7

*Resolved*, That, in order adequately to draw the line between undergraduate and graduate instruction in international law, the Conference makes the following recommendations:

Assuming that the undergraduate curriculum includes a course in international law, as recommended in Resolution No. 6, the Conference suggests that graduate instruction in international law concerns three groups of students:

- (a) Graduate students in law;
- (b) Graduate students in international law and political science;
- (c) Graduate students whose major subjects for an advanced degree are in other fields, for example, history or economics.

The first two groups of students have a professional interest in international law, many having in view the teaching of the subject, its practice, or the public service. Therefore, as to them, the Conference recommends that the graduate work offered be distinctively of original and research character, somewhat as outlined in Resolution No. 4, following a preliminary training in the fundamental principles of the subject, as pursued in the undergraduate course or courses.

As to those of the third group, having less professional interest in international law, a broad general course in the subject is recommended.

To the three classes of students mentioned, "(a) graduate students in law; (b) graduate students in international law and political science; (c) graduate students whose major subjects for an advanced degree are in other fields, for example, history and economics," there is coming to be added a group of graduates of law schools who come to the study of international law with a highly specialized preparation. Manifestly for all these classes no single place would be suitable. Some of these students might profitably pursue studies at

the proposed academy at The Hague; others might more advantageously do intensive work where facilities offer special opportunities.

#### RESOLUTION NO. 10

*Resolved*, That the Conference hereby calls the attention of the State bar examiners and of the bodies whose duty it is to prescribe the subjects of examination, to the importance of requiring some knowledge of the elements of international law in examinations for admission to the bar, and urges them to make international law one of the prescribed subjects.

Not merely should the attention of State bar examiners be called to international law as a subject of importance, but the same matter may well be first considered by the American Bar Association as proposed in Resolution No. 11, and also by the American Association of Law Schools.

#### RESOLUTION NO. 12

*Resolved*, That the Conference hereby adopts the following recommendations:

(a) That it is desirable, upon the initiative of institutions where instruction in international law is lacking, to take steps toward providing such instruction by visiting professors or lecturers, this instruction to be given in courses, and not in single lectures, upon substantive principles, not upon popular questions of momentary interest, and in a scientific spirit, not in the interest of any propaganda.

(b) That members of the American Society of International Law, qualified by professional training, be invited by the Executive Council or the Executive Committee of the Society to give such courses, and that provision be made, through the establishment of lectureships or otherwise, to bear the necessary expenses of the undertaking.

The committee was of the opinion that there should, under no circumstances, be made any provision sufficient to defray the entire expenses of such lectures, but that any institution that desires to have additional instruction in international law should be under obligation to defray a part of the cost of such instruction, and provisions have been made accordingly.

(c) That the Standing Committee on the Study and Teaching of International Law and Related Subjects of the American Society of International Law, the appointment of which was recommended in Resolution No. 1, be requested to ascertain what institutions are in need of additional instruction in international law and endeavor to find means of affording such assistance as may be necessary to the teaching staff of the said institutions or of supplying the additional instruction by lecturers chosen by the said Committee and approved by the Executive Council or Executive Committee.

(d) That steps be taken to bring to the attention of every college at present not offering instruction in international law the importance of this subject and the readiness of the American Society of International Law,

through its Standing Committee on the Study and Teaching of International Law and Related Subjects, to cooperate with such institutions in introducing or stimulating instruction.

This resolution is approved and in part carried out. The detailed steps to be taken to carry out the other recommendations are under consideration and provision has been made to enable the Committee to put the same into effect.

That has in part been done and further information is being gathered.

#### RESOLUTION NO. 13

*Resolved*, That this Conference hereby requests and recommends that universities having summer schools offer summer courses in international law.

*Resolved, further*, That the American Society of International Law, through its Standing Committee on the Study and Teaching of International Law and Related Subjects, is hereby requested to endeavor to stimulate a demand for courses in international law in summer schools.

This resolution has been carried out.

#### RESOLUTION NO. 14

*Resolved*, That the Conference recommends the establishment and encouragement in collegiate institutions of specialized courses in preparation for the diplomatic and consular services.

It is the opinion of the Standing Committee that courses in international law and diplomacy should be of such comprehensive character as to prepare the student broadly for any form of service to which he may be called. The total number of vacancies in the diplomatic, consular or insular service in any one year would hardly seem to justify extended specialization on such branches. The sounder educational policy would seem to be to request the Department of the Government having such examinations in charge to make the examinations for admission to the service general though thorough in character, and to require subsequent special preparation according to the post to which the candidate having an adequate general preparation is to be assigned. The service would thus obtain a larger number of candidates from which to choose, the essential breadth of preparation would be secured, the development of special fitting schools would be discouraged and a reasonable equality of opportunity would be extended to candidates from all parts of the country, as would be desirable under the American system of government.

#### RESOLUTION NO. 15

*Resolved*, That the Conference recommends that the study of international law be required in specialized courses in preparation for business.

The general principles involved in the Standing Committee's conclusions upon Resolution No. 14 apply to Resolution No. 15. Considering the interests of

business, the broad preparation is essential; and accordingly courses of such nature in international law and diplomacy should be included in adequate business training.

GEORGE GRAFTON WILSON, *Chairman*.  
 PHILIP MARSHALL BROWN.  
 AMOS S. HERSHEY.  
 CHARLES CHENEY HYDE.  
 HARRY PRATT JUDSON.  
 ROBERT LANSING.  
 JESSE S. REEVES.  
 ALPHEUS H. SNOW.  
 JAMES BROWN SCOTT, *Secretary*.

WASHINGTON, D. C., *April 29, 1916.*

The CHAIRMAN. You have heard the report. What is the pleasure of the Society as to its reception and approval?

Mr. SCOTT. I move that the report be accepted and approved.

Mr. CHARLES NOBLE GREGORY. There was frequent reference to a fund which has been provided. Is it proper to ask what those funds are and from what source derived?

The CHAIRMAN. May I ask whether the motion to accept and approve the report has been seconded?

(There were several seconds.)

Mr. SCOTT. I think perhaps I can answer the question, because in some respects I am a party in interest.

Briefly, the money comes from the Carnegie Endowment for International Peace. It appropriated at its last annual meeting, on the 21st day of April, the sum of \$5,000, to be placed at the disposal of the Standing Committee on the Study and Teaching of International Law and Related Subjects of the American Society of International Law, for such use of it as the Committee should care to make in carrying on its work, which, if successful, will, we believe, advance and increase the efficiency in teaching international law and in disseminating its principles more widely than hitherto has been the case.

While I am on my feet, Mr. Chairman, and replying to this question, I might state that the Standing Committee owes its existence to

the Carnegie Endowment for International Peace. Several years ago a distinguished publicist and diplomatist, the Hon. Andrew D. White, moved, in a meeting of the trustees of the Carnegie Endowment, that steps be taken to increase the dissemination of a knowledge of arbitration, international law and history as connected with arbitration, and that as far as possible or advisable, measures should be taken to increase the teaching of such subjects in American institutions of learning. While it was deemed expedient by the trustees to take no action of themselves in such an important matter, it was decided that a report should be prepared upon the teaching of international law and related subjects in American institutions of learning. This report was prepared by the Division on International Law of the Endowment, of which I have the honor to be the Director, and a recommendation was contained in the report that the American Society of International Law be requested to place upon its program the subject of the teaching of international law and related subjects in American institutions of learning, in order to see if its efficiency could not be increased and likewise the extent of instruction. The matter was placed before the Conference of Teachers held in Washington in April, 1914, and after a very careful consideration of the entire subject a series of resolutions was drafted, which met with the unanimous approval of the conference. These resolutions were presented to the Endowment and in general approved; that is to say, a resolution was passed by the Endowment thanking the American Society of International Law for the trouble it had given itself, congratulating it upon the value of its recommendations, and pledging the Endowment to coöperate with it in so far as coöperation might be desirable.

I might add that the recommendations approved by the Conference of Teachers have met with very general response. They were laid before the Second Pan American Scientific Congress at its recent meeting in Washington, and all resolutions general in character, as distinct from those that might be local to the United States, were adopted.

So, Mr. Chairman, by reason of the initiative taken in connection with the American Society of International Law, and the success which has already crowned the labors of the teachers of international law in this country, a substantial agreement has been reached, upon the measures necessary to be taken, by official and accredited repre-

sentatives of the twenty-one American Republics. I have prepared, and I shall lay before the meeting, a report of the proceedings of the conference, and also a report of the resolutions which have been accepted and approved by the Second Pan American Scientific Congress dealing with international law. Each article of the Teachers' Conference and each resolution of the Pan American Scientific Congress is cross-numbered, so that the relation between the two is readily seen by that simple device.

I should like to say, in this connection, that it seems to me the American Society of International Law has a very great opportunity for useful service. The recommendations which the Standing Committee has presented to you this morning are the result of very great thought and very great reflection on the part of the teachers of international law, and they recommend a tentative program which, in their opinion, seems to be feasible, and which, if carried out, will lead to still further recommendations. If these recommendations bring forth their fruit in due season in this republic of ours, there is every reason to believe that the other republics of the Western Hemisphere, which have accepted these recommendations by their accredited representatives to the Second Pan American Scientific Congress, will take proper action, directly or indirectly, to put into effect these recommendations in their different countries, with such modifications as may appear to them to be desirable.

Now, sir, I shall make a statement which I would rather have come from me than from any other member of this Society, which is that I believe the success of the labors of the American Society of International Law and of its Standing Committee in this matter depends upon separation from the Carnegie Endowment for International Peace. I am not, of course, ashamed of my connection with the Carnegie Endowment for International Peace, and I believe it can render very great services. I realize, however, that in certain quarters there is a prejudice against the Carnegie Endowment for International Peace; there is a feeling that any recommendation that it makes is necessarily of a propagandist, as distinct from a scientific nature. Therefore, in order that we may produce results which are worthy of the great subject and of the day and generation in which we live, it has been decided that, as far as possible, the Carnegie Endowment for International Peace shall withdraw into the background and shall only

coöperate with the American Society for International Law and its Standing Committee when it shall be requested to do so; that any money which may be appropriated by the Carnegie Endowment through its Division of International Law for the purpose of increasing the efficiency of instruction in international law and related subjects in American institutions of learning shall be placed to the credit of the Standing Committee for such use as it, in its judgment and wisdom, may care to make of it. I speak now for the committee in this regard, as its secretary.

One of the chief uses of such a sum will be to enable the Society to have members upon the committee representing all sections of the country, with the assurance that the committee will be able to meet in conference at stated periods. The members will not be asked to suffer the financial outlay that naturally results from coming from a very great distance to attend such meetings.

I have, at great length, perhaps at too great length, explained the relation between the committee, on the one hand, and the Endowment, on the other, and I have, without any concealment, disclosed the source from which the money placed at the disposal of the committee has come.

MR. GREGORY. I desire to express my gratitude for the very ample manner in which the intellectual curiosity which I ventured to entertain has been gratified. I would say, at the same time, that when I asked the question I did not desire to express the slightest hostility to the report of the committee or to the arrangements that have been made. I would, very earnestly, however, express the belief that the members of this Society are worthy of the confidence of their committee and their officers, and it is proper that they should understand all these arrangements before we pass upon any measure.

THE CHAIRMAN. Gentlemen, are there any further remarks upon the motion to accept and approve the report of this committee?

PROFESSOR WILSON. I would like to say, as chairman of the committee, that it is the unanimous opinion of all its members that this committee should be, as its name implies, a standing committee of the American Society of International Law and not a committee of the Carnegie Endowment in any sense whatever; that the directions and

injunctions which this committee will follow will be exclusively received from the American Society of International Law and from no other source whatever. I think that will make the position of the committee clear. The committee is a committee of the American Society of International Law; the teachers who are members of this Society, in conference, recommended that certain things be done; the committee is still a committee of the Society and it will endeavor to do absolutely nothing that the Society itself does not approve.

Mr. SCOTT. I had hoped that in this matter the source from which this revenue was derived would not be made the subject of discussion. It has been made the subject of discussion, however, and I appreciate the motives which inspired Mr. Gregory in making his inquiry. In further reply to his inquiry I beg to say that this separation of power, this separation of functions and independent control of whatever matters may be voted to be placed before the committee, has been made upon my motion; that I personally would not have anything to do with the Standing Committee, if in any way it were to be connected with, under the auspices of, or, indeed, under suspicion of being controlled by, an association of persons, no matter how laudable their program may be, who had in mind a special propaganda. The American Society of International Law is seeking to serve the cause of justice, but it is not seeking to serve the cause of justice as recommended by any society other than that composed of its own members.

I want to be very explicit about this, because I feel that the slightest suspicion that this committee is not acting as the agent of the American Society of International Law, or that the American Society of International Law is not a free agent in the matter, would militate very seriously against the success of these recommendations; and, since that question has been raised, I should like to make one further remark.

I have frequently been asked if it would not be desirable to have certain sums of money placed at the disposal of the American Society of International Law by way of a subvention. I have been asked if it would not be desirable and advantageous to have the American Journal of International Law receive a certain subvention in order to enable it still more efficiently to carry on its labors. I have refused to discuss the matter. I have rejected any overture of that kind in behalf of the Society of which I have the honor to be the Recording Secretary, and in behalf of the *Journal*, of which I happen to be one

of the editors, because I believe that if the American Society of International Law should even indirectly be regarded as connected with, or under the domination of, an institution with propagandistic tendencies, the days of our scientific deliberation and scientific usefulness are numbered.

I hope, Mr. Chairman, that this clear and frank and unmistakable statement, coming from one who has authority to speak for the Carnegie Endowment, will be sufficient to quiet the fears of any of our members.

The CHAIRMAN. Are there any further remarks?

Professor JAMES W. GARNER. I do not think any member of this Society feels for a moment that we are bound to take orders from the Carnegie Endowment, or, that in accepting this very generous coöperation, we shall be under any obligation to conduct a propaganda or anything of that sort. Quite to the contrary, I think every member of this Society must feel that we are deeply indebted to the Carnegie Endowment for this assistance. I think at the proper time it will be quite in order for this Society to adopt a resolution of thanks to the Endowment for this much-needed and well-timed aid.

Mr. EVERETT P. WHEELER. It does not seem to me that this gift is as much to our Society as it is to the colleges of the country to which it is to be given to aid in instruction. It is not a gift to this Society, but to the colleges, and there is no harm in it. As I go about amongst men in various walks of life I have in various ways come to be familiar with our plain people—in New York at least—and I am convinced that there is no such prejudice against Mr. Carnegie or against the Endowment as seems to be suspected or supposed. All the great colleges and universities of England were endowed by men of wealth, some of them princes. When they undertake to aid their institutions by establishing a lectureship there is no suspicion aroused there, and I do not think there is here. I believe the general feeling in this country with regard to Mr. Carnegie and his foundations, as well as his library system, is one of respect. Far be it from us to surmise even that there is any other feeling on the part of the American people. It seems to me to be unjust. I am very glad for my part, as a member of the Society—and I think I am one of the original members—that

this explanation has been made, and that we understand the whole thing now so clearly.

Mr. CHARLES HENRY BUTLER. Has the sum of money been placed at the disposition of the American Society of International Law or at the disposition of the committee?

Mr. SCOTT. A sum of money—not the entire sum of money—but \$1,000 of it, to enable meetings of the Standing Committee to be held and to enable it to begin its work with such clerical assistance and other assistance as it may deem advisable, was placed at the disposal of the Standing Committee of the American Society of International Law. If it is desired, it can be placed at the disposal of the American Society of International Law, to be appropriated and allotted to the Standing Committee as needed. There will be no difficulty about that.

(There were calls for the question on the motion.)

The CHAIRMAN. The motion is that the report of the Standing Committee on the Study and Teaching of International Law and Related Subjects be accepted, and that its recommendations be adopted. Perhaps the Chair might be permitted to say, although not by way of discussion of the subject, that the purpose of this committee is not to spread propaganda of an idea, but of an intelligent knowledge of our subject. If any members of the Society are in doubt of that, I respectfully refer them to the list of the names of the members of the committee on the last page, and the membership of that committee can be changed at the will of the Society.

(The motion was then put and duly carried.)

Mr. ARTHUR K. KUHN. I desire to ask if the Standing Committee is open to suggestions at this time?

Professor WILSON. We will be delighted to have suggestions either now, or at any time by correspondence. We would be glad to receive criticisms of any proceedings in which this committee may be engaged. There is nothing that the committee will accept more gratefully than

unfavorable criticism. We do not care to be patted upon the back, but we would like to do some constructive work.

Mr. KUHN. In view of the statement of the able chairman of the Standing Committee, I wish to state that I do not intend either to pat him on the back nor make any criticism of the work already accomplished. On the contrary, I think we are all agreed that the committee have made a splendid beginning, or, I should say, more than a beginning. But I thought, in view of their receptive mood at this time, it might be not out of place to make one suggestion to which I trust they will give due consideration.

I see nothing in the report with regard to the associated subjects of private international law and comparative law. Perhaps this was omitted advisedly, but I do feel that a thorough understanding of international law and international relations can not be complete without an understanding of the different systems of law which prevail throughout the world. The Anglo-American system is practically a unit; but when we consider the number of countries that are living under different systems of law and have different mental attitudes about their juridical questions, including questions that arise in public international law, I think you will agree, sir, that many of the difficulties which arise and which are now present before the nations of the world, can be better understood through a more wholesome and extended knowledge of the other systems of law, especially those derived from the Roman Civil Law.

I think we, in this country, have not done as much as other countries in the dissemination of knowledge about other systems. I think those of us who have had opportunity to travel abroad will agree that the knowledge of the Anglo-American system is more widely distributed and disseminated in Continental countries than is the knowledge of their systems in our country. I therefore suggest that the committee, in future deliberations, consider the advisability, so far as they are able to give attention to it, of the study of comparative law and also of the study of private international law.

Mr. SOTERIOS NICHOLSON. If the Society will give me a few minutes, I would like to present a paper.

The CHAIRMAN. It will be left to the Society, as to whether they shall proceed with the general order of business or hear you.

Mr. SCOTT. Without meaning to be discourteous to the gentleman, I would suggest that there is a regular order of business and that the subject desired to be presented by the gentleman should better be taken up under the heading of miscellaneous business. We are engaged now in presenting the annual reports of the committees to the Society, and I venture to suggest that that order of business should be followed. After that is disposed of miscellaneous business can be taken up.

The CHAIRMAN. The regular order of business is now before the Society.

Mr. SCOTT. The next matter is the consideration of the reports of committees. The first committee report is that of the Committee on Honorary Membership, on behalf of the Executive Council.

Professor GEORGE G. WILSON. The Standing Committee on Selection of Honorary Members consists of Professor Woolsey, Mr. Ralston and myself. The other members of the committee are unfortunately absent today, but I can report on behalf of the committee. The committee reports that, owing to the present conditions, it might be deemed an expression of prejudice for an honorary member of the Society to be selected from any portion of the world at the present time. They therefore beg leave to make no recommendation for honorary membership.

The CHAIRMAN. The report of the committee will be received. Apparently no action is necessary.

Mr. SCOTT. The next committee to present its report is the Committee on Increase of Membership.

I have a very brief report to make on that subject. The records of the Society show the following since May 1, 1914:

NEW MEMBERS:

Life .....	3
Annual .....	196
Total .....	199

DIED:	
Honorary .....	1
Life .....	2
Annual .....	20
Total .....	23
RESIGNED:	
Annual .....	47
DROPPED FOR NON-PAYMENT OF DUES:	
Annual .....	6
TOTAL OF PRESENT MEMBERSHIP:	
Honorary .....	4
Life .....	22
Annual .....	1,003
Total .....	1,029
SPANISH MEMBERS AND SUBSCRIBERS.....	243

Mr. SCOTT. I would like, in presenting this report, to make one further remark. In view of the great interest now being taken in international law, and in view of the necessity for a wider knowledge of its principles, it would be advisable at this time, I think, to appoint a very carefully selected committee on increase of membership, in order that active steps might be taken during the coming year to enlarge the membership of the Society and thus increase its usefulness.

I move you that instead of attempting to have a committee appointed at this time, a committee be appointed at a later time, as the result of thought and reflection, in order to increase, as I said before, the membership of the Society and thereby greatly extend its usefulness.

The CHAIRMAN. The report will be received. No action is needed on the report. You have heard the motion of Dr. Scott. Is there a second to that motion?

(There were several seconds to the motion.)

The CHAIRMAN. The motion has been seconded, Dr. Scott. How many members should that committee consist of?

Mr. SCOTT. I would like to leave that point entirely to the Chair, or to the Executive Council, so that it will not be embarrassed by a limitation of numbers.

Mr. BUTLER. If Mr. Scott will accept an amendment to that motion, I would move that the present committee be given power to add to its own members.

The CHAIRMAN. It is suggested that the present committee be authorized to add to its own members. Do you make that as a substitute motion, Mr. Butler?

Mr. BUTLER. Yes.

The CHAIRMAN. Dr. Scott, will you accept that amendment?

Mr. SCOTT. Yes, indeed, Mr. Chairman.

The CHAIRMAN. The motion is that the present committee be continued and that it be given authority to add to its own membership.

(The motion was seconded, put, and duly carried.)

The CHAIRMAN. What is the next committee report?

Mr. SCOTT. The report of the Committee on the Codification of International Law.

Mr. BUTLER. That matter was disposed of last night. The committee reported progress, asked leave to be continued and to make a later report to the Society, and the Society so voted.

The CHAIRMAN. That is in the minutes of last night and no action is necessary today.

Mr. SCOTT. The next committee is the Committee on Nominations, and I have been asked, as Recording Secretary, to present the report of the committee for such action as the Society may care to take. Mr. Montague is chairman of that committee and is not present this morning.

## REPORT OF THE COMMITTEE ON NOMINATIONS

The Committee on Nominations respectfully reports the following nominations for the year 1916-1917:

For President: Honorable Elihu Root.

## For Vice-Presidents:

Hon. Robert Bacon.	Hon. Robert Lansing.
Mr. Andrew Carnegie.	Hon. Henry Cabot Lodge.
Hon. Joseph H. Choate.	Hon. John Bassett Moore.
Justice William R. Day.	Hon. William W. Morrow.
Hon. Jacob M. Dickinson.	Hon. Richard Olney.
Hon. John W. Foster.	Hon. Horace Porter.
Hon. George Gray.	Hon. Oscar S. Straus.
Hon. P. C. Knox.	Hon. William H. Taft.

Chief Justice White.

## For Members of the Executive Council to serve until 1919:

Hon. John Barrett, District of Columbia.  
 Hon. Frank C. Partridge, Vermont.  
 Prof. Leo S. Rowe, Pennsylvania.  
 F. R. Coudert, Esq., New York.  
 Everett P. Wheeler, Esq., New York.  
 Alpheus H. Snow, Esq., District of Columbia.  
 Prof. William R. Manning, Texas.  
 Prof. John H. Latané, Maryland.

For Member of the Executive Council to serve until 1918 to fill the vacancy caused by the election of the Honorable John Bassett Moore to the Vice-Presidency: Hon. David Jayne Hill, of New York.

(Signed) ANDREW J. MONTAGUE, *Chairman*.  
 (Signed) PHILIP BROWN.  
 (Signed) JAMES W. GARNER.  
 (Signed) CHARLES NOBLE GREGORY.  
 (Signed) GEORGE G. WILSON.

The CHAIRMAN. Gentlemen, you have heard the report of the committee. What is the pleasure of the Society?

Professor PHILIP MARSHALL BROWN. I move that it be adopted.

(There were several seconds.)

The CHAIRMAN. You have heard the motion, gentlemen. Is there any discussion?

(There was no discussion and the motion was duly put and carried.)

The CHAIRMAN. The report of the committee has been accepted and the gentlemen nominated are duly elected.

Mr. SCOTT. There is another little matter still outstanding, namely, two letters which have been received from Professor Gordon S. Sherman, of Yale University, who had hoped to be present with us and take part in the proceedings. He has expressed his opinion on two subjects which have been discussed and has asked that his letters be incorporated in the proceedings.

I therefore move that authority be given to incorporate the letters dealing with those subjects in their proper place in the proceedings.

(There were several seconds and the motion was duly carried.)

LETTERS FROM PROFESSOR GORDON E. SHERMAN, OF YALE UNIVERSITY

MORRISTOWN, NEW JERSEY,  
*April 20, 1916.*

DEAR PROFESSOR SCOTT:

I much regret to say that an attack of grip last month has left me with a sensitive throat which, for the moment, renders much speaking difficult and imprudent. It does not seem wise, therefore, to contemplate a trip to Washington and participation in the meeting of the Society of International Law next week. I had hoped to have somewhat developed the thought expressed by Renault at the London Conference touching the question of penalizing a fleeing merchantman, a question of importance in view of the claim that the merchantman can be torpedoed at will: "S'il est constaté qu'il a, d'une façon quelconque, violé ses devoirs de neutre, il subira les conséquences de son infraction à la neutralité, mais il ne subira non plus une peine pour avoir tenté la fuite," etc. It would seem fitting that the Society confirm the majority opinion of the Naval Conference as expressed in the report of Renault on this point. Possibly it is intended to be covered in some address, or, if not, it may be taken up should I not be able to be present. I have not noticed any mention of the point in the various discussions of submarine matters, and venture, therefore, to suggest it to you. That a merchant vessel, armed or unarmed, should be torpedoed for attempting flight without active resistance would appear a wholly untenable position.

Believe me, always sincerely yours,

(Signed) GORDON E. SHERMAN.

DR. JAMES BROWN SCOTT,  
Washington.

MORRISTOWN, NEW JERSEY,  
April 25, 1916.

DEAR PROFESSOR SCOTT:

I have your very kind note of yesterday and am glad to know that you approve a discussion of the lawfulness of instantly sinking, by torpedo, a merchant ship endeavoring to escape, but not forcibly resisting stoppage. The General Report upon the Declaration of London very properly assumes that "if the merchant vessel is damaged or sunk" (through exercise of force designed to stop it) "she has no right to complain, etc.," but sinking, where an effort is merely directed at halting a ship, must radically differ from the launching of a torpedo whose practically sole purpose is the immediate destruction of the vessel with all on board. There would seem to be a wide distinction between the duty of a patrolman to learn the intentions of a solitary pedestrian encountered late at night and under reasonably suspicious circumstances, and the instant effort of the officer to murder without a moment's delay, should the suspected individual decline a parley. The argument in the *San Juan Baptista* (5 Chr. Robinson, 33) while not directly in point, favors the conclusions I have suggested. I greatly regret my inability to go to Washington this week and shall hope to find in the newspapers, at least, an account of the Conference.

Believe me, always faithfully yours,

(Signed) GORDON E. SHERMAN.

DR. JAMES BROWN SCOTT,  
Washington.

Mr. SCOTT. That finishes the business necessary to be considered.

The CHAIRMAN. Is there anything that any member of the Society desires to present at this time?

PROFESSOR BROWN. I was much interested in the remarks of Mr. Kuhn, because it seems to me he has pointed out a duty which we have heretofore ignored, that of giving proper consideration to jurisprudence in its widest sense, as the source of the principles of international law. This seems to me to be particularly apparent in the field of private international law and to be more definite still in our relations with Central and South America. It seems to be an unfortunate tendency in common law countries to stress the idea of territorial sovereignty and to ignore the point of view of other countries. You are all familiar with the fact that frequently it is stated in our common law courts, that if the point of view of other countries is accepted it is accepted as *comitas gentium*. It seems to me that, as a society, we should seriously endeavor to investigate and to facilitate the study of these wide differences in jurisprudence in order that questions which have heretofore

been treated as *comitas gentium* should be based more soundly on universal rights. I am not quite prepared to make a definite suggestion as to how we could do that, but I can indicate at this time a possible step that this Society might take that would assist us in attaining that object. It has occurred to me that we might possibly institute a summer school of international law where those who are particularly interested in that subject could gather together for a few weeks, say six weeks, where distinguished men from abroad, from Europe and South America, could be invited to lecture to us on just such topics as Mr. Kuhn has indicated; where our own public men of distinction could lecture, not only on questions of international law, but questions of international relations. It may be there will be considerable difficulty in the evolution of such a scheme, but it has appealed to me strongly as affording a possible means of disseminating in this country, through leaders of thought in international law and international relations, more definite knowledge on the subject; and I express here the hope that the Society may promptly take up the consideration of some such proposition.

Before taking my seat, I would like to make a definite motion on that subject at this time. It seems to me that this session of the Society has been most gratifying as an indication of the possibility of constructive work. In other words, that we are evolving from the stage of publicity and popularization and of awakening general interest in the subject, and are now approaching the serious duty of the construction of international law. I am sure that the discussion we have had here at this time has made us all feel that there is a serious duty incumbent on this Society to do something to formulate rules of international law to meet actual conditions. If we will stop a moment to consider, we will see that the work is stupendous. It seems that we have made a great step forward this year in having this procedure of one subject and two speakers to a session. It has enabled us, it seems to me, to reach more definite conclusions than we have been able to reach before.

It seems to me we can, in subsequent years, make more definite progress in procedure, and I would suggest that next year in arranging the program for this Society it be arranged sufficiently far ahead so that those who are to participate will be in a position to get together and formulate a definite proposition to sustain on the subject at issue, and that these propositions be worded in the form of resolutions to be

sent out to all the members of the Society, so that we could all come here prepared to discuss them, after being given opportunity to study the different propositions, and be prepared to vote upon them.

I therefore make the suggestion, as indicated, that the next meeting have its program prepared sufficiently in advance so that those who will participate will formulate their views in the form of resolutions, to be submitted to all the members of the Society sufficiently ahead of time to enable us to discuss, and, if possible, to reach a definite conclusion upon them after discussion.

The CHAIRMAN. Do you make that as a motion, Professor Brown?

Professor BROWN. Yes; I make that as a motion.

(The motion was seconded.)

Mr. SCOTT. I would like to make some observations on Professor Brown's motion. In the first place, I think nothing is more calculated to increase intelligent interest in international law than the organization of some such meeting as he suggests, which might be in the form of a summer school. I should think, however, that we should in the beginning limit ourselves to lecturers from our own country and that when we try an experiment we try it upon a somewhat smaller scale. If it is justified, we can then consider how we can expand it. That, Mr. Chairman, is one of the reasons why I was very careful in using the words law and jurisprudence in speaking of international law, because if it be taught as a part of law or as a system of law and as a part of jurisprudence, it necessarily follows that related subjects will be considered. I am not in a position to do more than say that I heartily approve of the suggestion, and if a method is devised for carrying it out I shall endeavor to secure its realization by having it aided by the Division of International Law of the Carnegie Endowment.

With regard to the second proposition, I would also approve of that, but I would ask that next year it be tried likewise on a very modest scale, because what it means is that we should appoint, either at the annual meeting, or authorize the President or appropriate officer of the Society to appoint committees to study and investigate, consider and present reports which would be printed and transmitted by the Society to its members. In this embryonic form you see an institute of interna-

tional law comparable to the institution established in Europe in 1873 and which has rendered such distinguished service. I would suggest that this matter be taken up, as Professor Brown has suggested, but that it be tried under the most favorable circumstances, namely, that only one subject be selected, and that the experiment also be tried with the members of the committee; that if it be decided to have a committee formed for the consideration of this question, the committee consult together in order that we might see, as the result of that experiment, whether it is feasible and whether it should be extended to all of our program. I might suggest, in this connection, that while it might increase very much our efficiency it would nevertheless require something of an outlay. It might be well to consider the matter in advance so that no undue drain be made upon our limited resources.

With these slight suggestions, I approve the two resolutions and, as I said before, I shall endeavor to secure the practical realization of a summer school in international law.

Mr. BUTLER. There are two resolutions before us. The first is with reference to the summer school, and the second with reference to the program. It seems to me the first resolution, with regard to a summer school, should be referred to the Standing Committee on the Study and Teaching of International Law and Related Subjects for consideration. I would be very glad if some way could be found for carrying out Professor Brown's suggestion.

With regard to the other suggestion, I think that the question of the program should be referred to the Committee on Program, of which I think Professor Brown is a member.

The CHAIRMAN. Do you make that suggestion as a motion?

Mr. BUTLER. Yes; I make that as a motion to refer.

The CHAIRMAN. Is that motion seconded?

(There were several seconds.)

The CHAIRMAN. The motion is that the two resolutions be referred to those respective committees.

(The motion was duly put and carried.)

Mr. SOTERIOS NICHOLSON. I desire to bring before the Society a resolution which I desire to be referred to a committee, if the Chairman desires to refer it.

Mr. GREGORY. I move that that resolution be referred to the Executive Council.

(The motion was duly seconded and carried.)

Mr. NICHOLSON. May I submit a few words to the Society? It will only take ten minutes.

Mr. WHEELER. I suggest that Mr. Nicholson's paper be referred to the Executive Council where it will receive careful consideration. It is not a matter that we can dispose of this morning, as there is other business to be taken up.

The CHAIRMAN. The Chairman will rule that that is the proper procedure.

Mr. NICHOLSON. May I leave these remarks with the Secretary to be incorporated in the proceedings? Is there any objection to that?

Mr. GREGORY. They could be left with the Secretary to be submitted to the Executive Council.

The CHAIRMAN. If there is no objection, the Chair will rule that the papers may be submitted to the Secretary and referred to the Executive Council with the rest of the material submitted by Mr. Nicholson.

If there is no further business before the Society, it will now stand adjourned.

## ANNUAL BANQUET

The Shoreham Hotel, Saturday, April 29, 1916, 7.30 o'clock p.m.

The following guests were present:

Alvarez, Dr. Alejandro	Echols, John W.
Anderson, Justice	Eliot, Edward C.
Andrews, Arthur I.	Elliott, Charles B.
Armour, Allison V.	Evans, Lawrence B.
Armour, George A.	Fenton, Major Charles W.
Armour, Norman	Finch, George A.
Atkisson, H. L. B.	Finch, Wilbur S.
Aymar, Francis W.	Fletcher, Bertram L.
Barlow, Burt E.	Flournoy, Richard W.
Bayard, Chaplain	Francis, James B.
Bell, J. C.	Gary, Hampson
Blakeslee, George H.	Gibbons, Sir George
Borchard, Edwin M.	Godoy, José F.
Brainerd, Ira H.	Graham, Samuel J.
Brand, Charles S.	Gray, Honorable George
Brewer, D. Chauncey	Gregory, Charles Noble
Butler, Charles Henry	Haff, Delbert J.
Callahan, J. M.	Harris, B. F.
Calloway, Honorable Oscar	Hayden, James H.
Capen, S. P.	Hazen, Charles Downer
Capó-Rodríguez, Pedro	Hill, Charles E.
Carr, Wilbur J.	Hill, Dr. David Jayne
Clifton, John W.	Holmes, L.
Collier, William Miller	Hudicourt, M. Pierre
Consaul, Charles F.	Irland, Fred.
Coudert, Frederic R.	James, Francis B.
Cowles, James L.	James, J. H.
Cox, W. F.	Joy, Clarence
Crane, Richard	Kennedy, Crammond
Davies, Julien T.	King, Archibald
Davis, Honorable John W.	King, George A.
Dean, Charles Ray	Knapp, Capt. H. S.
Dennis, William C.	Knapp, Judge Martin A.

Krehbiel, Edward  
 Kuhn, Arthur K.  
 La Fontaine, Senator Henri  
 Lansing, Honorable Robert  
 Latané, John H.  
 Learned, H. B.  
 McClellan, William  
 Macfarland, H. B. F.  
 MacKay, John  
 Merrell, Admiral J. P.  
 Millmore, Oscar L.  
 Nagel, Honorable Charles  
 Needham, Charles W.  
 Nicholson, Soterios  
 Nielson, Fred K.  
 Niles, Judge Alfred S.  
 Northrop, C. B.  
 O'Brien, Honorable Thomas J.  
 Oliver, Capt. James H.  
 Parker, Sumner A.  
 Partridge, Frank C.  
 Porter, George T.

Porter, H. K.  
 Potter, Charles F.  
 Putney, Albert H.  
 Ralston, Jackson H.  
 Rodgers, Capt. W. L.  
 Russell, Justice B.  
 Scott, James Brown  
 Shand, Miles M.  
 Siddons, Justice F. L.  
 Slayden, Honorable James L.  
 Smith, William Walker  
 Steenerson, Hon. Halvor  
 Steffens, Lincoln  
 Wales, Edward H.  
 Warren, Charles B.  
 Wheeler, Everett P.  
 Wiley, John Cooper  
 Williamson, C. R.  
 Willoughby, W. W.  
 Wilson, George G.  
 Wilson, Nathaniel  
 Woolsey, Lester H.

Wright, Charles B.

Mr. FREDERIC R. COUDERT, Toastmaster. Gentlemen of the American Society of International Law: In the first place, perhaps I should advert to something that you have already noticed with regret, because almost every phase of human happiness must be tinged with regret for something that might have been otherwise. Our President—I was going to say and I will say our great President and our only President—whom we had hoped to have with us tonight, especially upon this occasion, had a heavy cold, and after having sacrificed himself to come here at the opening of the meeting, was unfortunately compelled to go away again. He begged me to express to you his very sincere regret, which you know he feels in his heart, for you know what this Society has meant to him, and you know what he has meant which I am merely the incident.

I have been asked by the Secretary to present the following telegram from Professor George W. Kirchwey and letter from Honorable Oscar S. Straus, expressing regret at their inability to be present:

(Telegram)

HON. JAMES BROWN SCOTT,  
2 Jackson Place,  
Washington, D. C.

Deeply regret that I can not be with you Saturday night. As one who participated in the birth of the Society and who has had pride in its marvelous success I want to be counted as present in spirit even though absent in body. Especial greetings and congratulations to Mr. Root, Mr. Lansing, and Mr. Scott.

GEO. W. KIRCHWEY.

PUBLIC SERVICE COMMISSION

for the First District

Tribune Building, New York

Office of the Chairman.

*April 27, 1916.*

MY DEAR SCOTT:

I am in very deep here. Besides my work I am connected with the effort to end one strike involving about a thousand men, and to prevent another strike of the cloak and suit makers involving about sixty thousand workers, and I have engagements in endeavoring to effect conciliation running deep into the night. It looks to me that I am to be deprived of the pleasure and privilege of attending the Tenth Annual Banquet of our distinguished Society.

After all, our entire work in laying deeper foundations for international law is to secure the peace of justice. Now, that is exactly the work on a smaller scale that I am at this present time immersed in, and it seems to me I am working in the spirit of our Society. I can not tell you how much I regret not being with you and the distinguished little "bunch" that ten years ago electrified the ideals that developed into the American Society of International Law.

You and Kirchwey and the little group you gathered around you, including Judge George Gray, Delaware, Professor George G. Wilson, Chandler P. Anderson, the venerable John W. Foster and his distinguished son-in-law, Robert Lansing, the late Justice Brewer, the others who first assembled in the little room at the Mohonk Conference are the men who planted the seed and nurtured the tree that has grown into this mighty oak. Root, of course, gave us his effective leadership, and in the short space of one decade we have grown what we are, with every prospect that forests transplanted from this oak will grow up throughout all America to insure justice, resting upon the solid foundations of law. I trust that we may continue the work together with that encouraging effectiveness that has distinguished the first decade of the life of the Society.

With cordial greetings, which it would give me so much happiness to present in person,

Very truly yours,

(Signed) OSCAR S. STRAUS.

PROF. JAMES BROWN SCOTT,  
Chairman, American Society of International Law,  
2 Jackson Place, Washington, D. C.

This is an anniversary. It is, or I used to think it was, a great thing to have a birthday. I am not quite sure now that it is, as I get along toward being an octogenarian. I remember when I was a boy

of about eighteen at college, for some reason or other they insisted that I should try to learn Latin by reading *De Senectute* and understand the delights of old age. Possibly now I might begin to read it with more delight, if it were not that I am usually surrounded by such young and vigorous gentlemen that I never think of old age. But this Society is beginning to grow quite respectable; not only respectable from the standpoint of ability, because it has always had a plethora of that; not only respectable from the standpoint of eminence, because it has always had supereminence; but we are now reaching a time of life when we can take those serious, sober views of things which succeed upon the vacuity of tripping youth.

It is just ten years ago or thereabouts that this Society was founded. Of course we did not then realize—I say “we”; I was not one of them, but I should like by some *ex post facto* arrangement to feel that I had been, and perhaps I shall succeed in persuading myself that I was—we did not realize at the time that that was one of the most epoch-making events perhaps that the world had ever seen, and that the time was to come when this Society, by its deliberations, its elucidations, its lucubrations, as well as by its incidental debates and its extraordinary literary productions, would largely if not wholly regulate the human affairs of the cosmos. We probably did not realize that all the time, but I take it that even then our dreams were broad and wide, and we felt that we would in a short time accomplish much. And so indeed we have. And I looked up the record which the Secretary keeps—and is sometimes able to find—of the first meeting of the Society, in order that I might see who the founders were, those men who should go down to eternal fame as having founded a society in which the law of nations might find almost any number of eminent exponents, from almost any point of view. In looking it over I found these names, and I shall read them to you, gentlemen, because I think we should always be mindful of them with deep gratitude.

Perhaps I should first say a word as to how it was founded, because I have delved into the historic lore, and I want to impart it to you. This Society was the resultant or an aftermath of a conference at Lake Mohonk. Professor Kirchwey, Judge Gray and a few others were appointed a committee to meet for the purpose of looking into the question of the formation of a society of international law and an international law journal, and to report upon the

subject. I am fortunate in having at my right one of the most active members of that committee (Secretary of State Lansing).

The committee met a number of times, did valiant and heroic work, and signed a report which practically brought this illustrious organization of supermen into being. The names are Justice David J. Brewer, Judge George Gray, Hon. Oscar S. Straus, Hon. John W. Foster, Hon. Andrew D. White, Prof. George W. Kirchwey, Prof. Leo S. Rowe, Prof. James B. Scott, Mr. Everett P. Wheeler, Honorable Robert Lansing, Hon. J. M. Dickinson, Hon. James B. Angell, Hon. W. W. Morrow, Hon. John W. Griggs, Hon. J. B. Moore, Prof. Theodore S. Woolsey, Hon. Chandler P. Anderson, Prof. George G. Wilson, Mr. Charles Henry Butler, Prof. Joseph H. Beale, Jr., and Prof. Charles N. Gregory. It seems to me suitable and proper to read the names of these gentlemen, who are entitled to so many encomiums from us, and to so much of our gratitude. I only wish that we might line them all up, that is those who are with us and living, against the wall, not to shoot them, but only that they might shoot at us in turn and tell us of their many interesting reminiscences, and of the origin of the Society; but unfortunately that would be impracticable, because they are all so erudite, so witty and so delightful that I think pretty nearly any one of them could occupy the whole night if he so desired.

Now gentlemen, we have certainly had a most agreeable experience. We have been here for some days debating a great many questions. We have even debated the question as to whether there was any international law, and I do not think that question excited any more radical divergence of opinion than any of the other various questions that were propounded. I think we found ourselves in about the same degree of unanimity as to that, that we did about everything else. I remember my father telling of an old friend of his who once went to a book store. He was very fond of picking up old books, and he picked up a book the title of which was "Philosophic Proofs as to the Existence of God." He was a good Christian man. He looked at the book and said, "As though any man would have doubted it if some damned fool had not written a book to prove it." Perhaps one is tempted to revert to Robespierre, because that somewhat ebullient apostle of social reformation had his virtues and his ideas at times. Once when questioned regarding his religious beliefs, he refused to discuss the matter. He said it was very simple to him, because if God did not exist, it was the business of all good

governments to invent him. And so indeed one might feel that whether or not international law exists, it is the business of society, preferably this Society, to invent it. While I was musing on that trend of thought, our friend Charles Henry Butler arose and, as it were, with almost coincident inspiration, notified us that next year he would report a complete codification of the law of nations; so that we will only have to wait one short year, and then we will merely have to turn to a book, and instead of having to peruse long treatises, instead of having to go through great diplomatic correspondence, instead of having to read notes, shall I say we will only have to look into the index and find out an applicable provision, and then it will all be over. Of course the countervailing disadvantage is that we might then have to become *functus officio*; so that I should be in favor, if necessary, of suggesting that the Committee on Codification report only partially each year, perhaps a chapter at a time, and that they be allowed to continue at least for some indefinite time, and until the Society has at least reached its twentieth anniversary.

Certainly this is a felicitous occasion. It would indeed be even more felicitous if we had with us a greater number of our founders; but we have a number of them, enough to make the situation a very interesting one indeed.

In looking up the history of the organization, I find that at one time we debated the very difficult and interesting question as to whether men of mere commerce should be admitted to membership; and some of us who took the more mundane and possibly more materialistic view of the situation felt that the lawyers could by their superior brain power dominate the situation, and that incidentally the sinews of war might be extracted from those inferior people who pursue merely commercial callings. But the higher, the nobler and the better view finally prevailed, and it was decided that only the élite of the profession, only the intellects of America, should be admitted to membership. As I look out on the members tonight, I feel that those who took a sordid view were surely wrong, and that those who took the other view were entirely right. My belief in that respect was confirmed some time ago when I met one of our commercial gentlemen who, had the other régime prevailed, might have been here this evening, because of a certain prominence that he had in connection with international affairs. He said to me, "Have you given much time to the study of South American affairs?" I said no, but knowing that he

knew a great deal about such matters, I said to him, "Where did you obtain your extraordinary knowledge of South American politics? You must have given it great thought and read a great many books upon the subject." He said, "No, I am not conscious of ever having read any book on the subject; but when I really want to know much about the politics of that part of the world, I familiarize myself with what is going on in the ammunition factories. I find that a very satisfactory method." Now that indicates the commercial point of view, and it emphasizes the wisdom of our not having tried to make a sudden synthesis of both points of view. Yet somehow I am trying to believe that as time marches along it may be possible that both points of view may become reconciled, and it may be that the gentlemen who get their information in that way rather than out of the learned tomes and treatises with which we are so familiar, will so place their ability at our disposition that the initiative will come from international law and international order, and that the politics of the ammunition factories will be subordinated to the dictates of that higher body who form the constituency of the Society of International Law. I do feel that in some way and in some manner and at some time there will be a complete synthesis, and that the conflict between the two points of view will, by practical and wise and at the same time learned and disinterested men, be completely solved.

The absurdity of assuming that because of recent events there is no international law is indicated by the fact that the people talk of little else. I find it impossible to walk down Wall Street or Broadway without overhearing conversations of the various brokers, all of whom are perfectly confident that they know all about international law, and that there is scarcely any point in connection with that recondite science which any banker's clerk in the city of New York, at least, and I assume that it may be so in other cities, is not willing to express a fixed and definite opinion in regard to. Therefore I take it that a matter in regard to which there is so much discussion, so much certainty of attitude and difference of opinion, must have some outer objective existence, and need not be wholly invented by this Society.

In some of our transactions, animated and delightful as they were, many definitions were hazarded of various things, which might well be adopted by other societies, by statesmen and thinkers the world over. Among others there were definitions of neutrality. Yet, after all, the man in the street sometimes gives a better definition than any

of us. We have all heard of the Kentuckian who said that he did not care what happened, provided it did not happen to him; and perhaps after all the wisest "jurisprudential" minds could scarcely have conceived a more complete and coherent definition of that difficult subject that we discussed at so great a length last evening. Of course, it is possible that that definition might be improved upon, and that members of our Society, placed in times of stress and strain where they should be, and where nature and talent and membership indicated that they should be, in office—might so enlarge that Kentuckian's definition of neutrality as to make it take on a different significance, and cause us to believe that nothing happens to anybody else that does not happen in some measure to us also. It seems to me that perhaps the definition is very much in the making, and that we may perhaps pass that phase. If we do, and proceeding from the concrete to the abstract, it will be largely due I think to the efforts of our membership and of our Society, and to this interchange of views from every standpoint that has been going on here during the last ten years.

Now gentlemen, if I began my remarks this evening by regretting that in certain respects we were unfortunate, I should perhaps congratulate myself upon the fact that in other respects we are most fortunate, because we have with us a gentleman who can entertain and enlighten and thrill and guide us. I take it that international law is after all very much—if I may use the phrase—cold storage politics, frozen politics, politics of the past, chilled for use in the future; and I believe that it is the general view now of those who occupy themselves with hygiene, with the more delicate functions of digestion, that cold storage products are not always the best and the most healthful, and that it is sometimes better to deal with fresher and more succulent viands. And then, again, in the great world-conflict that is going on we see two different conceptions. We see the conception of nationality gone apparently so far in one direction that sometimes, for the moment at least, it seems to have, if not destroyed, at least obscured the concept of the universality and brotherhood of man. A constant struggle has been going on since the nations emerged from the Middle Ages, between that great and beneficent conception, nationality, and that broader, wider and greater and later conception of human brotherhood; both useful, both necessary, the great difficulty being to find a synthesis between the two. Will a synthesis be found? The day when it is found, the age in

which the reconciliation comes about, will be the greatest that mankind has seen, because the two greatest forces that make for good, patriotism and religion, will finally be completely reconciled, and then perhaps we will need little of international law and little of politics.

One is impressed by concrete and tangible things much more than by mere phrases. Speaking of the strength of nationality, in connection with the ideas of sovereignty, I remember one day in late August of 1914 stopping at a little railway station only a few minutes outside of Paris, and a good kind old man said, "Perhaps you could do something. You are an American, you have an automobile, and you may be able to go and do something for some of the poor fellows there." I went to the little railway station, and the dusty troops were going out, and sad-faced women were watching them go. I asked the *chef de gare*, "Have you any wounded men here?" He said, "They have been coming in very fast. Those who have no chance of recovery have been left here. Those who are wounded in the arms or legs are sent to the hospital; but if they are shot in other places there is no use. There are some over there. We will be glad if you can do anything for them. We can not, because we have not anything."

I went into an adjoining room. The *chef de gare* opened the door, which was locked to keep out the curious crowd, and for the first time in my life I saw a scene showing what patriotism actually was; not in the phrase, not in the books, not in the mouth, but actually at work among the simple and plain people. In that little room, which was nothing but a lavatory, on a dirty floor which had no covering but straw, lay five French Territorials, that is, men in the late 30's and early 40's, every one of whom probably had a family. They were stout men, in everyday life commonplace enough, probably men that we would have met as butchers, bakers and candlestick-makers, and paid very little attention to. They had gone out at the first call and had been shot on the outskirts of Paris. The man in the middle had just died as I came in. There was only a little skylight. You could hardly see. The *chef de gare* led me and I went in and stood for a few minutes. One of the wounded men had put his handkerchief over the face of his dead comrade. One of them I think was a professional man. The others looked like the humbler grade of citizens. They lay there, shot in the stomach. There they all lay, quietly dying. They knew it was the end. They did not groan. They scarcely spoke. I went to one of them and spoke to him. I said, "Is there anything

"I can do for you?" He said, "Yes, I would like a little water." I said, "How do you feel?" He said, "I feel very badly, sir, because I realize that I will never be able to go back." He knew he could never be able to go back to the front. That was the way he felt; that was the dominant emotion; that was the glorious force of patriotism that was at work. Now how can that tremendous force be utilized for the best,—that noble and quasi-religious force, without at the same time having it pushed so far in the direction of sovereign domination or aggrandizement that the world's foundation is shaken and the fundamentals of law are undermined. That is the great conflict.

It gives me great pleasure to introduce to you tonight a master of history, of diplomacy, of international law, who will talk to you about the great subject of national sovereignty in its relation to international law—Honorable David Jayne Hill.

Honorable DAVID JAYNE HILL. Mr. Toastmaster and Gentlemen: After the very earnest remarks of the Toastmaster, I am sure you will excuse me if I do not undertake to introduce the serious matters which I have to bring to your attention tonight by any of those welcome pleasantries which are so enlivening in our post-prandial addresses.

I am going to speak to you very briefly, but very seriously, in regard to international law as an expression of life. In the picture, Mr. Toastmaster, which you have just presented to us, you have given us a vivid sketch of life. Is it possible, I ask you, that such heroism, such patriotism, such a divine sense of duty, felt in a million hearts, in a score of nations, should not make its impression upon the future of the law of nations? I think it is quite impossible for any of us, however learned, fully to comprehend the course and tendencies of international law in its long and tedious development without close attention to the progress of international life, the vital development of mankind in history.

If we pause to ask ourselves which is actually the more potential, life or law, the answer must be that law,—by which I mean, of course, human law,—is really the outgrowth and expression of life. There can, in fact, be no permanent system of law that does not take account of vital necessities.

If we stop to consider the different phases and successive periods of international life, we find strong confirmation of this statement.

In primitive times the only remedy for barbarism was imperialism.

The history of civilization began with the founding of empires. The idea that the state was originally the result of a voluntary contract by the people, is now generally recognized to be entirely unhistorical and erroneous. The state originated through the forcible imposition of authority, the work of a dominant caste ruling among a people, or of a conquering caste imposing its dominion from without. The theory underlying this procedure was, and still is, that a particular form of culture is good for men and that it may, therefore, rightfully be imposed upon them. For the tribute and military service they are forced to render their masters they receive the protection of their own lives and at least some of their property by the state.

The break-up of the Roman Empire, which had embodied this theory, resulted from the recrudescence of overwhelming barbarian life in the empire. Then began the slow, painful building up of feudal, and ultimately, national states, during which there was an ever recurrent struggle for the establishment of a new empire claiming the right to be universal. But the conflict between the civic and ecclesiastic ideals of what such an empire should be defeated this effort. The active agency in this contest was the thrust and drive of national ambitions, pushing aside the formulas of the Church and of the Empire, and asserting the new and independent life of the nations.

Then came the struggle for metes and bounds of competing royal authorities, the assertion and contradiction of claims of jurisdiction, a new form of religious life battling against the formulas of the old, the wars of religion, the final contest between spiritual imperialism and national freedom, terminating at the end of the Thirty Years' War in the Peace of Westphalia of 1648, and the triumph of territorial sovereignty.

But undisputed territorial jurisdiction was understood to mean absolutism in government. It meant the complete dominance of the sovereign rules. The will of the Prince was law. And how could it be otherwise, when the result of the Peace of Westphalia was summed up in the maxim, *Cujus regio ejus religio*? The right to dictate a religion was a right to control both soul and body; and so Europe became incrustated with a new law against which the life of man beat in vain, until at last there came a new liberation in a new theory of the state.

And this time it was from America that it came. Sailing across the Atlantic in pursuit of religious freedom, a little company of Pil-

grims sat down in the cabin of their tossing ship to draw up a compact in which they pledged themselves to enact for their governance "just and equal laws," to which they pledged "all due submission and obedience." That was in 1620, while the Thirty Years' War was raging. But that compact was destined to be the seed of a new era; for a new life had entered the world of action,—the life of individual freedom, and the conception of law as something not imposed from without, but evolved from within by the reason and the conscience of man.

Coëval with the era of absolutism were set in motion in America expressions of life that eventually produced the revolutionary era, when "The Rights of Man" were to be asserted, first in the American Revolution, and then in the French Revolution, which became a leaven to the whole of Europe.

At the close of the revolutionary era in 1815, by the Congress of Vienna, the new conception of law had, in truth, not triumphed. Its progress had been arrested, but it gave impetus to the constitutional movement, which from that time forward, until 1848, crying out for constitutional liberty, battered with bleeding hands at the doors of absolutism, closed by Metternich's system.

Had that movement completely succeeded, we should today be living in a different world. There would have followed a Declaration of the Rights and Duties of Nations such as has, within the present year, been embodied in the document adopted on January 6, 1916, by the American Institute of International Law, at its first session in the city of Washington. Only, in that other case, it would have been an agreement made by all the European nations that those rights and duties must be observed. We should then have had a constitution of civilization that would be to the nations of the world what a fundamental law is to a constitutional state: a definition of specific rights and duties, an institution of methods of peaceable and legal procedure for the redress of wrongs, and a restriction of governmental powers under a recognized system of fundamental principles of justice.

Before proceeding to explain why that movement failed of complete fruition, and why there has followed a period of serious obstruction and delay, it may be permitted, in a few sentences, to state what such a really constitutional conception would involve.

It necessarily begins with the postulate that, since power is a merely dynamic conception, and right is essentially an ethical conception, a true type of governmental authority can never be derived from any

embodiment of physical force, whether embodied in a monarch, or in a caste, or in a majority of the people, or even in the totality of the people. In short, might is not right, and no sophistry can ever make it so.

Law, to be authoritative in a true sense, must be derived from the nature of man as a being possessing the conception of right, and feeling himself to be the possessor of rights, that is, to be the possessor of rational claims to just treatment.

Every frame of government should, therefore, be preceded or accompanied by a declaration of rights, thus marking out a province which government is not permitted to invade. It is, therefore, an essential part of a constitution in this sense, not merely to set up a frame of government, but to define the limits beyond which government may not go.

This was done, so far as domestic action and legislation are concerned, in the Constitution of the United States. It has not been done generally in the formation of the constitutions of other so-called constitutional countries, and it has never been done at all as regards international relations. And yet it is the one thing which the life of mankind is at this moment craving and earnestly longing for, and must have, namely, a recognized legal restriction upon what one nation may do to another nation, until there has been a hearing, a trial, and condemnation by a disinterested authority. And there are some things which no nation should ever be allowed to do to another, under *any* circumstances; just as there are some things which a government ought never to be allowed to do to an individual citizen.

And now there is but a moment in which to say why the constitutional movement in Europe, which led to a new revolution in 1848, did not succeed. It did not succeed, in the first place, because there stood in the way the false and indefensible dogma of absolute sovereignty sustained by force of arms; that is, the right of the sovereign, whoever he is, to do whatever he pleases, a pretension which has no basis in the nature of man or of society, a mere rudimentary vestige of primitive imperialism, which has no more to do with the life of communities and of nations than the mysterious vermiform appendix which disturbs and endangers the life of the individual has to do with the well being of the human body. And, like that, it ought to be extirpated.

And the second reason why that movement did not succeed is that,

even in the states of Europe which professed to be constitutional, the inherited idea of absolute and unlimited national sovereignty, latterly supposed to be inherent in the people, was united with an acute sense of solidarity of the economic interests of each nation, in the form of industry, trade, maritime influence, and colonial expansion. Thus, about 1850, began a new era in international life impelled by economic ambitions, a period of commercial imperialism that continues to the present time, and now constitutes a serious menace to the peace and well-being of mankind.

It is impossible here to enter into details regarding the forces producing this new era, through which we are now passing; but no one aware of the origin of the present world-war can doubt for a moment, when the drapery of excuse and explanation is swept aside, that it is fundamentally a war for trade and for trade routes, in which the resources of industry and the possession of markets play the conspicuous rôle.

This new and urgent form of modern life has brought about a situation demanding new legal adjustments. What confronts us is a situation in which economic expansion is in unholy alliance with the inherited but preposterous idea of absolute sovereignty. It takes whatever it can grasp and hold. To obtain and maintain its grasp, it is prepared to perpetrate any enormity. It is ready to ruin the whole of Europe, and to challenge all the rest of the world in its mad career. It pours living men by the hundreds of thousands into the red-hot gaping crater of death. It rains explosives from the skies, it renders the breath of life a cruel poison by asphyxiating gases, it respects neither manhood, nor womanhood, nor childhood. It threatens the destruction, not only of civilization, which it has already almost wrecked, but the very existence of the human race.

We must, therefore, find a new law, or human life will be impossible. And what shall that law be? On what shall it be based? Upon an outworn theory of the state, once relatively harmless, but now become preposterous? Upon the assumption that some nation, by its superiority of force or efficiency, is henceforth to rule the rest of mankind? Upon the pretension that even the people, the all-wise and all-powerful people, are to do whatever they please, without legal restriction?

Shall we not rather conclude, that the time has come for the nations, and especially for this nation, to affirm in no doubtful terms

that there are certain rights and duties of nations upon regard for which the future of mankind depends?

Whoever has closely studied the great turning-points of history must be aware that new eras are originated by new exigencies. At this moment we are passing through that experience. Whether we are to be joined by others or left alone in splendid isolation is not our responsibility. We can not do better, we must not do less, than to repeat the words used by Washington to the convention called to frame our Federal Constitution: "Let us lift up a standard to which the wise and the virtuous may repair; the future is in the hands of God."

The TOASTMASTER. In connection with the interesting remarks of our friend Dr. Hill, one is tempted to recall the saying of that great Frenchman, Hippolyte Taine, speaking with all the incisive lucidity of his race, when he summed up the matter, *Les idées font les passions*. The Society of International Law will only propagate great ideas, and when adopted by the public opinion of the world the righteous passions thereby engendered would make peace, amity and international good will.

Now gentlemen, the Society is ten years old. I believe that according to the ancient ecclesiastical rule a child reached the age of reason at seven; that is, he was old enough to be damned or almost anything else. I do not suppose any such fate is collectively in store for this Society, whatever may befall individual members in their various endeavors to promote evanescent reforms. But I rather incline to the belief that biological analogies are frequently if not always misleading, and that the Society of International Law reached the age of reason when it was founded. My basis for so believing is that the first suggestion in regard to its foundation came from a man who had for years displayed the highest faculties of legal reasoning, who had adorned our bench, and who was in the best and truest sense, a great and typical American. It was Judge George Gray who at the Mohonk Conference was the first to suggest that America should have an international law society. It was consequent upon his suggestion, and upon the lucid remarks in which he closed and summed up that suggestion, that the initial velocity was imparted to the movement, and thereby we are here. Hence, it is a great gratification to all of us who respect and reverence, and I may say love him, to have our

founder of founders, our friend Judge Gray here with us tonight. He has been good enough to promise to say a few words to us.

HONORABLE GEORGE GRAY. Mr. Toastmaster and Gentlemen of the American Society of International Law: I shall have to begin by disclaiming. I reluctantly disclaim, because it would be a great pleasure to me to know that I could rightfully claim the honor that the Toastmaster has seen fit to do me by proclaiming me as the founder of this Society. It was my good fortune to have been a member of the Mohonk Conference in June, 1905, and to have had the honor of presiding over that conference, when it was suggested to me as the presiding officer, by some gentlemen who are present here tonight, that the founding of a distinctly American international law society would be a proper climax to the debates of the Mohonk Conference of that year. So I can only claim that the suggestion seemed to me to be a most happy one, and I took the opportunity in opening the conference on the second of June to say a few words in laudation of what seemed to me a happy suggestion. Still I do consider myself fortunate to have been associated with the beginnings of this Society, and I well remember how on the afternoon of that day, upon the adjournment of the conference, a number of gentlemen, to whom really belongs the honor of starting this idea of a distinctly American international law society, assembled in a room in the Mohonk Hotel, and there spoke the first word which led afterward to the committee on organization which finally resulted in the establishment of this Society. The names that were read by the Toastmaster belong to gentlemen who afterward met in New York, and not hastily but deliberately and with great sagacity laid the foundation of this Society.

Ten years ago the first meeting of the International Law Society thus formed took place in this city. From that time to this it has met annually, with the increasing interest of all who were first concerned, or who have since had the privilege of being members, as we have beheld the progress made by the Society, in disseminating throughout this country some idea of our rights and duties as a nation, some idea of what is due from us to the rest of the world, as well as what is due from the rest of the world to us. I am sure I need not dwell upon the progress that has been made. You all appreciate as I do how great an instrumentality this Society has been in creating an interest in the great subject of international law. I confess that on

that June morning in the year 1905, my own conception of international law was pretty cloudy and vague, but I hope I have learned much since. I have been glad to sit at the feet of these learned professors, who so quietly and industriously for years before 1905 had been instructing their classes, large or small, I am afraid more frequently small than large, in the fundamental principles that govern the intercourse of the civilized nations of the world. We have learned—at least I am speaking for myself—in some measure that international law has its most fruitful growth, its most helpful expansion and its most intelligent cultivation among democratic peoples. Democratic countries are the nursing mothers of international law. The common sense of the plain people, whom Mr. Lincoln once said God must have loved because he made so many of them, the common sense of the mass of the people in this democratic country responds quickly and easily to the fundamental, simple truths which lie at the foundations of all the technical canons and rules of the science of international law. So that we are not here to spread abroad the tenets of a recondite science, or to preach international law in the terms of scholasticism; but we are here to appeal to the common mind of our countrymen, that they must observe those restraints, that they must observe those rules, which spring from and govern the moral nature of men, in order that our country may maintain a great and honored place in the family of nations.

I have been corrected sometimes by the professors of international law when in my innocence I have said that, after all, international law is international morality. It still seems to me to be a not inapt definition of international law, certainly in one view at least of that great science; and yet I am told that because it must be positive law, expressed in positive rules and canons of obligatory force, it is something more than international morality. That may be true, but at the foundation, and underlying all positive rules of international law, it became obligatory by reason of the consensus of opinion of nationalities and peoples that compose the separate members of the family of nations, because all those rules that are not merely technical and administrative are founded upon the broadest humanities that modern civilization has gradually and painfully educed. What is it that commends to the conscience of the world, to the common sense of mankind, to the patriotism of our country, the diplomatic notes that have come from our State Department in the last year, except the

broad humanities that support them and underlie them, and must forever defend them?

So I am glad to believe that in this great democracy of America, where, as Dr. Hill has so eloquently portrayed, we have learned as the necessity of a democracy, as well as of an empire or of an absolute monarchy, the necessity of restraint upon power, whether vested in all the people or in a caste or a Kaiser, the restraint that international law imposes upon the individual members of the family of nations, of the same kind and resting upon the same philosophic basis that the necessity of restraint rests upon the individuals who compose a democratic government. Our government is great because it is a democracy which is governed by self-imposed restraints. Man emerged from barbarism only by reason of his capacity for restraining his impulses, his passions, his appetites, and as time has gone on we have found that democracies, as well as absolutisms, if they are to survive must place upon themselves those restraints that are necessary to support a wise and successful government.

I am glad that this Society has been the instrumentality of appealing not only to the professional caste, not only to the men bred in the profession of the law, but to the general intelligence of the country; because we are not dealing with the technicalities of a recondite science, as I said a while ago, but we are appealing to the best thought and patriotism of the people of a free country who are able to recognize right conduct and to stand by it.

A good deal is said in the press, and I think we hear it constantly from our friends on the street—to use the phrase that some one used this morning—that in this great cataclysm of war that is making the streams of Europe run red with the blood of human beings, international law has perished, that there is no such thing as international law longer to be talked about except as a myth of the past, a fond iridescent dream of scholars and philosophers who have written and talked about it, but which has proved to be a mere cloud in the sky that has disappeared. That is a very pessimistic view to take, for I do not think international law has entirely perished. I was playing golf the other day with a Presbyterian minister whom I very much respect and revere, and he said to me: "I see you have been interested in international law, and in societies for the bringing about of peace through international law. It must be a great regret to you that there is no such thing left since this war." I replied: "You are

preaching every Sunday the moralities of the decalogue, when you know they are violated every day; but the decalogue remains, the great moral law remains. When that is effaced from the minds of men then indeed we are hopeless."

What was it Kipling said?

Though all else depart,  
The great Commandments still remain.

The Commandments that have been evolved, through the trials and struggles of men from barbarism up to civilization, producing a moral sense, which have more or less regulated the world and made all that is in the world worth living for, still remain in the hearts of all right thinking and right feeling people; and here in this country may we not hope that we will keep the Ark of the Covenant, and still proclaim to the world that there is such a thing as international morality which no nation or country can violate with impunity, and without being placed in that moral isolation that is more punitive than any sanction that can belong to a municipal law.

I do not believe that there is to be ever such a concert of nations, such an agreement among the great peoples of the world that we can coerce one nation, by a combination of armed force, to obey the mandates of international morality or international law. Human nature is such, its motives are so diverse, that we could never bring about such an agreement; but there still remains that moral sanction of international law which can never be divested from the hearts and minds of civilized people. We do not realize what a sanction after all is behind the enforcement of international law. Jurisdiction is conferred by the Constitution upon the Supreme Court of the United States to entertain the suit of one sovereign State against another. That jurisdiction has been resorted to more than once in our history, and the court has asserted its jurisdiction in cases of that kind. Yet we know, for the court has said so, that there is no power in the Supreme Court to enforce its judgment or decree when made in favor of one State against another. Of course, if it is a question of boundaries, the judgment or decree of the Supreme Court executes itself. The boundary is established. No one can transgress it. But in case of an executory judgment, where something is to be done, a mandate

to be obeyed, the court is powerless to enforce it. Do we say there is no sanction behind the judgment of the Supreme Court in a case between two sovereign States?

Let me read what in a very recent and notable case was said by Mr. Chief Justice Fuller on the demurrer in the case of *Virginia v. West Virginia*, in the matter of the enforcement of the debt between those two States. The bill filed by Virginia against West Virginia, asking that it should assume its portion of the debt that formerly was due from the old State, was demurred to, and was argued before the Supreme Court. One of the specifications of the demurrer was that the Supreme Court had no authority to enforce its decree if it made one against the defendant State. Mr. Chief Justice Fuller, delivering the opinion of the court, after a very able argument, said that the court would pass by that phase of the question, and would assume jurisdiction and consider what could be done after the decree if any should be made. In the final judgment or decree Mr. Justice Holmes delivered the opinion of the court, and used this language:

"As this is no ordinary commercial suit, but, as we have said, a quasi-international difference referred to this court—"

Now listen—

"in reliance upon the honor and constitutional obligations of the States concerned rather than upon ordinary remedies, we think it best at this stage to go no farther, but to wait the effect of a conference between the parties, which, whatever the outcome, must take place. \* \* \* This case is one that calls for forbearance upon both sides. States have a temper superior to that of private litigants, and it is to be hoped that enough has been decided for patriotism, the fraternity of the Union, and mutual consideration to bring it to an end."

Is there nothing of sanction behind that judgment of the Supreme Court, think you? Are we not content to leave it where the fathers left it who framed the Constitution in reliance upon the honorable sense of obligation, or the sense of honorable obligation resting upon the States against whom the decree was entered? And so I believe that more and more, when that world-wide opinion is so mobilized and formed, as alluded to by Mr. Root in the address that I did not have the privilege of hearing but read with great pleasure, there will

be a force found that will be an ample sanction against a recalcitrant State for any violation of international law.

Now I am not going to detain you longer, for I only rose and was only asked to be a little reminiscent in regard to the formation of this Society. It has been a great satisfaction to me to have had my name even associated with a society where there are so many experts, and from whose debates I hope I have learned something of international law. But I want, in closing, to allude to what I learned this afternoon from a very distinguished gentleman, an octogenerian, who told us in a most interesting fashion of his experience with Mr. Lincoln, whose friend he was, when journeying with him from Philadelphia to New York where he was en route to make his celebrated Cooper Institute speech, before his nomination. That was very interesting, of course, but what struck me was the phrase with which Mr. Lincoln concluded that great speech,—the simple, direct language with which he left that great audience. Allow me to read it:

“Let us have faith that right makes might; and in that faith let us to the end dare to do our duty as we understand it.”

The TOASTMASTER. The invigorating remarks of our friend Judge Gray call to my mind the statement of a great statesman, with whom perhaps and with whose doings neither Judge Gray nor the Supreme Court would always have found themselves in accord—I refer to Count von Bismarck, who once said that no nation could afford to enter upon a great conflict without first having appraised the force of the imponderable. That was his form of paying tribute to those great moral forces forming that vague but in the end sure and omnipotent force, world public opinion; and it is perhaps to be regretted that those who have put so much faith in some of his teachings do not give them a more omnibus adhesion. If so, the world might be better off.

And now, gentlemen, before presenting the last speaker, who is so prominently connected with the only organization that we will admit may possibly exceed even this one in greatness and dignity, it seems to me that the appropriate moment has arrived to stand and drink the health of the President of the United States, who, like the flag of the United States, typifies its dignity, morality and power. Gentlemen, the President of the United States.

(A toast was drunk to the President of the United States.)

And now, gentlemen, among our founders there was the delightful, kindly, lovable, learned, and always modest man who was then known to us, and always will be known to us in our family reunion, under the affectionate title by which we always thought of him as Bert Lansing—dear Bert Lansing as I have heard so many men say to whom he has meant so much. Personality counts for much in a work like ours, which seems to deal with rather dry and abstract matters, and the personality of the men who conduct these affairs—means much in attracting men together. Men cluster about these personalities as the iron filings cluster about a magnet, not only because of their learning and ability and judgment, but rather because of that great wholesome humanity which is in them, and makes them great in their lovableness. Now our friend Bert Lansing has been translated, but thank heaven he has not been transmuted. He is still to us always Bert Lansing, whom I take great pleasure in introducing to you to say a few words which he has been kind enough to promise that he would say. I introduce him by that title by which he is known to fame, and by which he will go down to history, the Honorable Secretary of State of the United States. May we drink to his health and life-long success—Secretary Lansing.

(A toast was drunk to the Secretary of State.)

Secretary LANSING. Mr. Toastmaster and Gentlemen: I confess that, being in the family of the Society, I am abashed, as I always am in speaking before members of my family, and I would be more abashed if it were not that I realize that you all know what a flexible tongue and what a rare and voluminous vocabulary our distinguished Toastmaster has. If he was not a luminary in the field of jurisprudence I am sure he would be the greatest writer of obituaries this nation has ever produced. On my own behalf, I bespeak that he may write my obituary. Whenever I listen to Mr. Coudert it reminds me of going into a beautiful library where I am surrounded with magnificent bindings. I am not always sure that I know or care what is in the volumes, but I do admire the bindings.

While this anniversary is an event in the life of the Society which is a matter for congratulation it is to me a matter of greater congratula-

tion that ten years of uninterrupted growth and prosperity and influence have given ample proof that it is an organization which had a right to be. It filled a need in the intellectual and student life of this nation. No one today can deny to it the right of existence. It does not require justification. In that it differs from many of the associations and societies which are being launched in greater and greater numbers on this helpless and long-suffering country of ours.

I suppose that this increase in the birth-rate of organizations is the natural result of this age of combination, when those with the same end in view, however big or little that end may be, seek to advance their cause by united action or more often, alas, for our peace of mind, by united utterances. I must say that I frequently become impatient with this multiplication of organizations, the great majority of which are duplications or variants of other organizations already in existence or else exert about as much influence on public opinion as the light of a candle does on the sun at noonday. It is a pity so much time and labor and money should be wasted on useless organizations (and their name is "Legion") instead of being devoted to upbuilding those whose worth has been tried and proven.

It would appear that a great many people believe that the solution of a social or economic or international problem or the attainment of a desired object is practically accomplished if they can form a society. Organization, they seem to think, takes the place of individual effort. The result is the whole movement flattens out into a dead level with no one responsible for the success or failure of the enterprise until at last without a struggle it dies an unlamented death. As I read history, great social and intellectual movements have not been successful unless there has been independent and devoted effort by individuals, rather than by organizations with their constitutions, their by-laws, their public appeals, and all that sort of thing. If we could abolish nine-tenths of the associations, the societies and the organizations, which have been recently formed in this land and which eat up energy and money without accomplishment, we would be a great deal better off, for individuals would then put their personalities into a movement instead of thinking that they had done all that was necessary when they have founded an organization.

I have now freed my mind and have, figuratively speaking, tossed in the wastebasket the dozens of invitations to join new-born societies which litter my desk, as I have no doubt they litter yours.

I am thankful to say that the American Society of International Law does not belong to the class of organizations which have no reason for their formation or continuance. Our Society came into being with a very legitimate purpose, the creation of a medium for the exchange of ideas by those who are interested in the relations between nations. Through our meetings and through our publications the members have had ample opportunity to learn the views of other members, to consider them and to criticize them. By this means our knowledge has been increased, our faulty conceptions corrected, our ideas crystallized. The benefit has been essentially to the members. It has undoubtedly benefited others outside of the Society, but that benefit is a by-product. The object of the Society, as I conceive it, lies primarily within itself. It is not chasing rainbows or aiming to materialize dreams, though sometimes we have addresses which show a predilection for the impracticable and visionary. However, the Society itself is eminently practical in that it is devoted to the intellectual development of its membership in a subject in which all are interested.

The practical object of this Society, its proved usefulness, the unflagging interest of its members, its remarkable success, and the splendid future which lies before it, are subjects of which we, its members, may be justly proud.

You will pardon me, I am sure, if I say that I have special reason to feel proud tonight on this tenth anniversary, because it was my fortune to be one of the founders of the Society. I well remember the May day nearly eleven years ago, when Dr. James Brown Scott and I sat in a little rustic summer house fastened to the cliffs which overhang Lake Mohonk and planned together this Society and the publication of a journal devoted exclusively to international law; I also remember how, when the plan was vaguely formulated, we sought the aid of the syren tongue of Professor Kirchwey, the cordial approval of Judge Gray and the enthusiasm of Mr. Straus to draw others into the movement; and how our combined efforts resulted in the appointment of a committee of organization, which later performed its labors so admirably.

Do you wonder that, as I look around me tonight on this gathering of distinguished men, who are members of the Society which was born that day beside the little mountain lake, I am moved with pride and a deep sense of gratification that I was privileged to be one of those who can claim a participation in that first effort which brought this

Society into being and started it out on a career which has been far more successful than we then dared to hope or even to imagine?

Perhaps I should confine my remarks to the past. Doubtless that is the natural and proper thing to do on an occasion of this sort, when we are celebrating the completion of a decade of life, when we are all in a reminiscent mood, when we are glorying in our past. Nevertheless I am impelled to say just a word of the future.

The present titanic struggle of the great empires of Europe has shaken international law to its foundations. There is coming a time, a time which will begin with the restoration of peace to this suffering and war-sick world, when we will have to readjust our ideas as to the rules of international law. I do not mean the *principles* of that law, for they are immutable, founded as they are on justice, righteousness and humanity. I mean that the application of these principles to new conditions will give us new rules which have never before been recognized or even conceived by the nations of the world and which can not, therefore, be now invoked by belligerent or neutral.

If I were asked what was the chief cause of the new conditions and changed methods of land and naval warfare, I would unhesitatingly answer that it was the invention of the internal combustion engine. It has made practicable the automobile, the submarine, the aeroplane, and the dirigible. It has made surprise almost impossible on land, and it has vastly increased the possibility of surprise at sea. The change of conditions which this invention, aided by the telephone, the wireless, and the camera, has brought about is comparable only with that which was wrought by the invention and use of gunpowder. These new conditions offer to the student of international law a field of speculation which is at once attractive and difficult. I mean by "difficult" that, however ardent the student may be, he must go very slowly or he will lose his bearings. He must be a philosopher rather than a legalist. He must scrap-heap a lot of the old ideas embalmed in layers of precedent and return for light and inspiration to those eternal principles which must guide nations in their relations with one another if liberty and justice are to be exalted in the earth.

It is the unchangeable standard of these fundamental principles which is the rock of salvation to international law, and whatever code of rules as to the conduct of war may in the future be formulated by the nations of the world it must find a sure foundation on that rock which is imbedded deep in the consciousness of modern civilization.

Knowing as I do the ever-increasing interest of our membership in the subjects which invite our thought and study as a result of the present war, I look forward to the future of the Society with confidence that it will be even more brilliant than its past has been. I can not see how it can be otherwise.

In the new field, to which we will turn our attention, and which I pray God may soon be open to us, I hope that the Society may continue to have as its President the wise statesman and profound thinker who for the past ten years has given so much of himself to the Society and to whom in very large measure our present prosperity is due. With his commanding intellect and lofty ideals to guide us, we can advance with the full assurance that we are treading the path which will lead us to the heights.

The TOASTMASTER. Gentlemen, I can not refrain from thinking that for one who never looks beyond the bindings of books, the Secretary does very well indeed.

Now, gentlemen, I am sorry that the evening is so late, because I see so many of our friends here who were with the Society in the beginning, who have done so much, and who have enlightened us so much, like Dr. Wilson, and our good friend Dr. Gregory, and Dr. Scott who does so much and talks so little; but I feel that as far as you are all concerned it is time to go to sleep, and as far as I am concerned, I am constrained to go to New York where there is no sleep. Therefore, I must thank you for your kind attention to the interesting, eloquent, able and eminent speakers, and for your long forbearance with the Toastmaster. Good night.

## MINUTES OF THE MEETING OF THE EXECUTIVE COMMITTEE

March 13, 1915

Pursuant to the call for the meeting, the Executive Committee met on March 13, 1915, at 3 o'clock p.m., at No. 2 Jackson Place, Washington, D. C.

Present:

Hon. John W. Foster, *Chairman*

Mr. Charles Henry Butler

Hon. Chandler P. Anderson

Mr. Jackson H. Ralston

Mr. James Brown Scott.

Communications were received and read from the Honorable George Gray, Honorable Robert Lansing, Honorable Elihu Root and Professor George G. Wilson.

The purpose of the meeting was to consider the Program of the Ninth Annual Meeting of the Society, which had been referred to the Executive Committee because it was found to be inconvenient for the Committee on the Ninth Annual Meeting to assemble for that purpose.

Letters from Professor Philip Marshall Brown and Professor James W. Garner, members of the Committee on the Ninth Annual Meeting, suggesting topics for the program of the meeting were received and read.

An invitation from the Chairman of the Section on International Law of the Second Pan American Scientific Congress, inviting the Society to participate in the meeting of that Congress to be held in Washington, December 27, 1915, to January 8, 1916, was laid before the Committee. In view of this invitation, and considering that the proposed Congress would be officially convened and supported by the Government of the United States and was likely to awaken interest in all the other American countries, the Executive Committee deemed it desirable and advisable that the Society should take part in the proceedings of the Congress, and accordingly decided to postpone the Ninth Annual Meeting until that time, so that it might be held in conjunction with the meeting of the Congress. It was further decided that the Society should hold its regular meeting and discuss its own

program in connection with the meeting of the Congress, and should reciprocate the courtesy of the Congress in inviting the members of the Society to take part in its program by extending an invitation to the members of the Congress in attendance upon the Section of International Law to attend and take part in the Society's meetings.

The Recording Secretary was directed to send out a circular notice to the members of the Society notifying them of this action.

Whereupon the Executive Committee at 4.10 o'clock p.m. adjourned.

JAMES BROWN SCOTT,  
*Recording Secretary.*

[Circular]

THE AMERICAN SOCIETY OF INTERNATIONAL LAW

WASHINGTON, D. C., March 31, 1915.

*To the Members of the American Society of International Law:*

The Executive Committee on March 13, 1915, held a meeting at No. 2 Jackson Place, Washington, D. C., to consider the program of the Ninth Annual Meeting of the Society, which had been referred to it because it was found to be inconvenient for a sufficient number of members of the Committee on the Ninth Annual Meeting to assemble for that purpose. There were present at the meeting the following members:

Honorable John W. Foster, *Chairman*,  
Honorable Chandler P. Anderson,  
Mr. Charles Henry Butler,  
Mr. Jackson H. Ralston,  
Mr. James Brown Scott.

Communications were received from the following members:

Honorable George Gray,  
Honorable Robert Lansing,  
Honorable Elihu Root,  
Professor George G. Wilson.

At the meeting an invitation from the Chairman of the Section on International Law of the Second Pan American Scientific Congress was laid before the Committee, inviting the Society to participate in the meeting of that Congress to be held in Washington from December 27, 1915, to January 8, 1916. The preliminary program of the Congress is being sent you under separate cover. The subjects to be discussed in the Section on International Law will be found on pages 32 to 35.

It will be noted that it is expected that the first session of the American Institute of International Law will also be held in connection with the Congress. This newly organized Institute is made up of representatives of national societies of international law formed in the different Pan American countries, of which a number are already in existence. You will recall that at the last meeting of the Society it was voted to affiliate and coöperate with this Institute. (Proceedings for 1914, pp. 231-232.)

In view of the invitation to participate in the Congress, which is officially convened and supported by the Government of the United States and which will

awaken interest in all the other American countries, the Executive Committee deemed it desirable and advisable that the Society should take part in the proceedings of the Congress and accordingly decided to postpone the Ninth Annual Meeting until that time so that it may be held in conjunction with the meeting of the Congress. It is expected not only that the members of the Society will take part in the meetings of the Section on International Law of the Congress, but that the Society itself will hold its regular meeting to discuss its own program, which will be arranged with the dates of meeting and sent out in due course, and hold its annual banquet as usual.

JAMES BROWN SCOTT,  
*Recording Secretary.*

JOHN W. FOSTER,  
*Chairman.*

# **MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL**

**Thursday, April 27, 1916**

The Executive Council met at No. 2 Jackson Place, Washington, D. C., at 3.30 o'clock p.m.

Present:

Mr. Charles Henry Butler	Hon. Frank C. Partridge
Mr. Frederic R. Coudert	Mr. Jackson H. Ralston
Mr. Charles Noble Gregory	Mr. James Brown Scott
Prof. John H. Latané	Mr. Alpheus H. Snow
Hon. Andrew J. Montague	Prof. George G. Wilson.

In the absence of the Chairman, the Honorable Andrew J. Montague presided.

The minutes of the Council of December 30, 1915, were approved as printed in the Proceedings and their reading dispensed with.

The Secretary made the following report on the membership of the Society since May 1, 1914:

## **NEW MEMBERS:**

Life .....	3
Annual .....	196
	199

## **DIED:**

Honorary .....	1
Life .....	2
Annual .....	20
	23

## **RESIGNED:**

Annual .....	47
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## **DROPPED FOR NON-PAYMENT OF DUES:**

Annual .....	6
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## **TOTAL OF PRESENT MEMBERSHIP:**

Honorary .....	4
Life .....	22
Annual .....	1,003
	1,029

Total .....	1,029
SPANISH MEMBERS AND SUBSCRIBERS .....	243

It was explained that the Treasurer was out of the country and was, therefore, unable to be present at the meeting. The report rendered by him on December 30, 1915, was reread by the Assistant to the Secretaries.

Several members of the Council queried whether the expenditure of \$300 per annum for the salary of the Assistant to the Treasurer did not constitute a larger proportion of the Society's income than should be paid for this service. The necessity for the expenditure was also questioned, and it was suggested that these duties might be turned over to the Business Manager and this sum saved to the Society. It was thought inadvisable, however, to act upon the matter in the absence of the Treasurer, and the following resolution was adopted:

*Resolved*, That the Treasurer of the Society be communicated with in order to see if the item of three hundred dollars per annum, paid to the Assistant to the Treasurer, can not be dispensed with and saved to the Society.

The Council directed that in future the Treasurer's reports be submitted to cover the fiscal year of the Society beginning on the first day of January in each year as provided in Article 5, Section 3, of the Constitution.

The Committee on the Selection of Honorary Members reported that it had no recommendations to make, and the report was accepted by the Council.

A letter of January 20, 1916, from the Honorable John Bassett Moore, resigning his membership on the Board of Editors of the *American Journal of International Law*, was laid before the Council, and the following resolution was adopted:

*Resolved*, That the Recording Secretary be requested, in behalf of the Executive Council, to communicate with Mr. Moore and to urge that he consent to remain a member of the Board of Editors of the *American Journal of International Law*.

The resignation of Mr. Moore was thereupon laid upon the table.

The Recording Secretary reported that at a meeting of the Board of Editors of the *Journal*, held on December 30, 1915, after the adjournment of the meeting of the Council held on that date, the Board had decided to recommend as additional members of the Board of

Editors, the Honorable David Jayne Hill, of Washington, D. C., and Professor Jesse S. Reeves, of the University of Michigan. The Council thereupon approved the action of the Board and elected Messrs. Hill and Reeves to membership on the Board of Editors of the *Journal* as of December 30, 1915.

The following gentlemen were then elected members of the Committee on Nominations to report candidates at the forthcoming meeting of the Society in accordance with Article IV of the Constitution:

Honorable Andrew J. Montague, *Chairman*.  
Professor Philip Marshall Brown.  
Professor James W. Garner.  
Mr. Charles Noble Gregory.  
Professor George G. Wilson.

Whereupon the Council adjourned at 4.45 p.m.

JAMES BROWN SCOTT,  
*Recording Secretary.*

## MINUTES OF THE MEETING OF THE EXECUTIVE COUNCIL

Saturday, April 29, 1916

The Executive Council met in the Shoreham Hotel at 11.50 o'clock a.m., immediately upon the adjournment of the Society.

Present:

Mr. Charles Henry Butler

Hon. George Gray

Mr. Charles Noble Gregory

Prof. Amos S. Hershey

Prof. John H. Latané

Hon. Frank C. Partridge

Mr. James Brown Scott

Mr. Everett P. Wheeler

Prof. George G. Wilson.

Hon. George Gray presided.

The following officers were unanimously reelected and the Secretary cast a single ballot for the Council for each of them:

Chairman of the Executive Council: Hon. John W. Foster.

Recording Secretary: Mr. James Brown Scott.

Corresponding Secretary: Mr. Charles Henry Butler.

Treasurer: Hon. Chandler P. Anderson.

Assistant to the Secretaries: Mr. George A. Finch.

Members of the Executive Committee: Hon. Elihu Root, Hon. George Gray, Mr. Jackson H. Ralston, Hon. Robert Lansing, Hon. John Bassett Moore, Hon. Oscar S. Straus and Prof. George G. Wilson.

Upon motion duly made and seconded the following committees were continued for the ensuing year:

Standing Committee for the Selection of Honorary Members: Prof. George G. Wilson, *Chairman*; Mr. Jackson H. Ralston and Prof. Theodore S. Woolsey.

Committee on Publication of Proceedings: Mr. George A. Finch and Mr. Otis T. Cartwright.

The Committee on Codification and the Standing Committee on the Increase of Membership had been continued by previous action of the Society.<sup>1</sup>

<sup>1</sup>See pages 107 and 127 of these Proceedings.

Upon motion duly made and seconded the appointment of the Auditing Committee and the Committee on the Eleventh Annual Meeting of the Society was referred to the President with power.

The following gentlemen were unanimously elected members of the Board of Editors of the *American Journal of International Law*:

Mr. James Brown Scott, Editor-in-Chief	
Hon. Chandler P. Anderson	Prof. Charles Cheney Hyde
Prof. Philip Marshall Brown	Hon. Robert Lansing
Mr. Charles Noble Gregory	Hon. John Bassett Moore
Prof. Amos S. Hershey	Prof. Jesse S. Reeves
Hon. David Jayne Hill	Prof. George G. Wilson
Prof. Theodore S. Woolsey.	

Secretary of the Board of Editors and Business Manager,  
George A. Finch

The Council considered the class of persons which should be sought for membership in the Society and discussed whether the present policy of seeking to enroll all persons who may be interested in international law should be continued or an effort made to confine membership to scholars. The view was expressed that the Society should not attempt to convert itself into an institute for the adoption of resolutions or the issuing of declarations of principles, but should continue the work in a way that will enlist the coöperation of all who may be interested in the study of international law and the promotion of international relations on the basis of law and justice. The following resolution was adopted:

*Resolved*, That it is the sense of the Executive Council that the widest membership for the Society should be sought.

The Council then, after consideration, adopted the following resolution:

*Resolved*, That the following regulations be, and they are hereby, adopted for the guidance of the Committees on Program of the Annual Meetings:

1. That the seal of the Society be placed on all programs of the Society's meetings.

2. That at every meeting of the Society the American flag be displayed.

3. That a large-faced clock be placed on the wall opposite the speaker's desk.

The Council next took up the discussion which had taken place at the meeting of the Society concerning the offer of funds by the Carnegie Endowment for International Peace for the purpose of furthering the work of the Standing Committee on the Study and Teaching of International Law. It was the sense of the Council that it would be proper for the Society to accept the funds, to be used for the purpose stated, and, if accepted, that they should be turned into the Treasury of the Society and appropriated to the use of the Standing Committee. At the conclusion of the discussion the following resolution was adopted:

*Resolved*, That the Executive Council hereby accepts with thanks the money offered to the Society by the Carnegie Endowment for International Peace for the work of the Society in connection with the study and teaching of International Law and related subjects, and hereby appropriates the same to the use of its Standing Committee on the Study and Teaching of International Law and Related Subjects, to be expended on requisitions approved by the Chairman of the Standing Committee drawn on the Treasurer of the Society.

A resolution offered at the meeting of the Society by Mr. Soterios Nicholson and referred to the Council was next considered. The resolution provided for the appointment of a committee "to consider the proposed machinery for peace among nations by the creation of a federal judicial, legislative and executive body to pass upon international judicial matters," as outlined in a study by Mr. Nicholson entitled "War or a United World." After consideration of the resolution and the written explanation which accompanied it, the Council adopted the following resolution:

*Resolved*, That the Executive Council deems it inconsistent with the practice of the Society to pass such a resolution as that proposed by Mr. Nicholson.

The renewal of the contract for the publication of the *American Journal of International Law*, which expires before the next an-

nual meeting of the Society, was then considered by the Council, and the following resolution was adopted:

*Resolved*, That the new contract for the publication of the *American Journal of International Law* be signed by the Treasurer and Recording Secretary of the Society with the approval of the Board of Editors of the *Journal*.

Whereupon the Council at 12:50 o'clock p.m. adjourned.

JAMES BROWN SCOTT,  
*Recording Secretary.*

## A REPORT OF THE STANDING COMMITTEE ON THE STUDY AND TEACHING OF INTERNATIONAL LAW AND RELATED SUBJECTS

Of the sixteen resolutions and recommendations adopted by the Conference of Teachers of International Law and Related Subjects at the meeting on April 23-25, 1914, nine were referred to the Standing Committee on the Study and Teaching of International Law and Related Subjects. This Committee was appointed under Resolution No. 1, and consists of:

*Chairman*, Professor George Grafton Wilson of Harvard University

Professor Philip Marshall Brown of Princeton University

Professor Amos S. Hershey of Indiana University

Professor Charles Cheney Hyde of Northwestern University

President Harry Pratt Judson of the University of Chicago

Honorable Robert Lansing, Secretary of State

Professor Jesse S. Reeves of the University of Michigan

Mr. Alpheus H. Snow of Washington, D. C.

*Secretary ex officio*, Mr. James Brown Scott, Recording Secretary of the Society.

The resolutions referred to this Committee were Resolutions numbered 3, 4, 6, 7, 10, 12, 13, 14 and 15.

Before considering the special resolutions it may be said that the Committee is agreed in the opinion that no attempt should be made to standardize instruction in international law and kindred subjects. Particularly as compared with other subjects, the qualifications of instructors are unlike and the resources of institutions vary. The aim should be to improve, strengthen and make more general and comprehensive all such work by whatever means this may be possible. In general the broad nature of these subjects of study should be kept in view and the fundamental principles involved should be emphasized.

The Committee is agreed that every possible effort should be made to avoid an impression that there may be a short method for the mastery of the principles of international law or the material of

related subjects. For this reason the Committee wishes to emphasize the need of adequate and systematic training conducted in a scientific manner and without partisan or other prejudice.

The special resolutions referred to the Committee may be found stated in full on pages 69-74 of the Report of the Conference of American Teachers of International Law, April 23-25, 1914.

#### RESOLUTION No. 3

*Resolved*, That, in order further to increase the facilities for the study of international law, the Conference recommends that steps be taken to extend the study of that subject by increasing the number of schools at which courses in international law are given, by increasing the number of students in attendance upon the courses, and by diffusing a knowledge of its principles in the community at large, and, more particularly:

(a) That, as the idea of direct government by the people grows, it becomes increasingly essential to the well-being of the world that the leaders of opinion in each community be familiar with the rights and obligations of states, with respect to one another, as recognized in international law. Hence, it has become a patriotic duty, resting upon our educational institutions, to give as thorough and as extensive courses as possible in this subject.

(b) That a course in international law, where possible, should consist of systematic instruction extending over at least a full academic year, divided between international law and diplomacy.

(c) That prominent experts in international law be invited from time to time to lecture upon the subject at the several institutions.

(a) While recognizing the gratifying increase in instruction, an investigation seems to show that there are great differences in the conditions under which instruction in international law and kindred subjects is carried on throughout the United States. Students are seeking institutions offering satisfactory courses on these subjects. There is particularly in consequence of recent changes a growing interest in international affairs. Educational institutions desirous of meeting the demands are accordingly providing courses upon international law and international relations; but the Committee is of the opinion that the importance of the subject in general merits a much greater development.

(b) A course of instruction of one year divided between inter-

national law as a system of law and the application of its principles in international relations is regarded as a minimum. Experience seems to show that better results are obtained by consecutive rather than by concurrent study of these subjects when only one year is possible, *i. e.*, a half-year of international law followed by a half-year of international relations rather than a division of the periods in each week between these subjects. Where it is not at present possible to give adequate courses in international law and international relations, more attention should be given to diplomatic history. Where possible, a full year or more should be given to each subject.

(c) In order that there may be full value in the occasional lecture or course of lectures by an expert introduced from without the institution, every effort should be made to make such lectures a part of the systematic work of the student, for which the student shall be responsible as for other lectures in the course, and in some instances students should have special preliminary training in order to gain from the expert all that may be possible. Such lectures, if worthy of introduction, should be scientific and should not be made additional work or optional, but an integral part of the course. This point of view is essential for the student and stimulating to the lecturer.

It is suggested that in many sections of the country a course may be given in one or more institutions by a lecturer or instructor from a neighboring institution, or several institutions may coöperate in securing a non-resident lecturer for definite periods.

#### RESOLUTION No. 4

*Resolved*, That, with a view of placing instruction in international law upon a more uniform and scientific basis, the Conference makes the following recommendations:

(a) In the teaching of international law emphasis should be laid on the positive nature of the subject and the definiteness of the rules.

Whether we regard the teaching of value as a disciplinary subject or from the standpoint of its importance in giving to the student a grasp of the rules that govern the relations between nations, it is important that he have impressed upon his mind the definiteness and positive character of the rules of international law. The teaching of international law should not be made the occasion for a universal peace propaganda. The interest of students and their enthusiasm for the subject can best be aroused by impressing upon

them the evolutionary character of the rules of international law. Through such a presentation of the subject the student will not fail to see how the development of positive rules of law governing the relations between states has contributed towards the maintenance of peace.

(b) In order to emphasize the positive character of international law, the widest possible use should be made of cases and concrete facts in international experience.

The interest of students can best be aroused when they are convinced that they are dealing with the concrete facts of international experience. The marshalling of such facts in such a way as to develop or illustrate general principles lends a dignity to the subject which can not help but have a stimulating influence.

Hence, international law should be constantly illustrated from those sources which are recognized as ultimate authority, such as: (a) cases, both of judicial and arbitral determination; (b) treaties, protocols, acts, and declarations of epoch-making congresses, such as Westphalia (1648), Vienna (1815), Paris (1856), The Hague (1899 and 1907), and London (1909); (c) diplomatic incidents ranking as precedents for action of an international character; (d) the great classics of international law.

(c) In the teaching of international law care should be exercised to distinguish the accepted rules of international law from questions of international policy.

This is particularly true of the teaching of international law in American institutions. There is a tendency to treat as rules of international law certain principles of American foreign policy. It is important that the line of division be clearly appreciated by the student. Courses in the foreign policy of the United States should therefore be distinctly separated from the courses in international law, and the principles of American foreign policy, when discussed in courses of international law, should always be tested by the rules which have received acceptance amongst civilized nations.

(d) In a general course on international law the experience of no one country should be allowed to assume a consequence out of proportion to the strictly international principles it may illustrate.

While at present no attempt to standardize the instruction in international law is made, the following recommendations are approved:

(a) In the teaching of international law emphasis should be laid on the positive nature of the subject and the definiteness of the rules.

(b) In order to emphasize the positive character of international law, the widest possible use should be made of cases and concrete facts in international experience.

(c) In the teaching of international law care should be exercised to distinguish the accepted rules of international law from questions of international policy.

(d) In a general course in international law, the practice of no one country should be given weight out of proportion to the strictly international principles it may illustrate.

As to the method of carrying out these recommendations there is wide difference of opinion. A pronouncement by any government does not necessarily follow international law and should be the subject of careful consideration not only in order that we may know the facts of our own and other governmental action, but also in order that the errors and misapplications of international law may not at times be perpetuated.

#### RESOLUTION No. 6

*Resolved*, That it is the conviction of this Conference that the present development of higher education in the United States and the place which the United States has now assumed in the affairs of the Society of Nations justify and demand that the study of the science and historic applications of international law take its place on a plane of equality with other subjects in the curriculum of colleges and universities and that professorships or departments devoted to its study should be established in every institution of higher learning.

That the United States has a position among the nations making a knowledge of international law essential to intelligent leadership is clear, and the report under Resolution No. 3 is aimed to realize the proposals of Resolution No. 6.

#### RESOLUTION No. 7

*Resolved*, That, in order adequately to draw the line between undergraduate and graduate instruction in international law, the Conference makes the following recommendations:

Assuming that the undergraduate curriculum includes a course in international law, as recommended in Resolution No. 6, the Conference suggests that graduate instruction in international law concerns three groups of students:

- (a) Graduate students in law;
- (b) Graduate students in international law and political science;
- (c) Graduate students whose major subjects for an advanced degree are in other fields, for example, history or economics.

The first two groups of students have a professional interest in international law, many having in view the teaching of the subject, its practice, or the public service. Therefore, as to them, the

Conference recommends that the graduate work offered be distinctively of original and research character, somewhat as outlined in Resolution No. 4, following a preliminary training in the fundamental principles of the subject, as pursued in the undergraduate course or courses.

As to those of the third group, having less professional interest in international law, a broad general course in the subject is recommended.

To the three classes of students mentioned, "(a) graduate students in law; (b) graduate students in international law and political science; (c) graduate students whose major subjects for an advanced degree are in other fields, for example, history and economics," there is coming to be added a group of graduates of law schools who come to the study of international law with a highly specialized preparation. Manifestly for all these classes no single place would be suitable. Some of these students might profitably pursue studies at the proposed academy at The Hague; others might more advantageously do intensive work where facilities offer special opportunities.

#### RESOLUTION No. 10

*Resolved*, That the Conference hereby calls the attention of the State bar examiners and of the bodies whose duty it is to prescribe the subjects of examination, to the importance of requiring some knowledge of the elements of international law in examinations for admission to the bar, and urges them to make international law one of the prescribed subjects.

Not merely should the attention of State bar examiners be called to international law as a subject of importance, but the same matter may well be first considered by the American Bar Association as proposed in Resolution No. 11 and also by the American Association of Law Schools.

#### RESOLUTION No. 12

*Resolved*, That the Conference hereby adopts the following recommendations:

(a) That it is desirable, upon the initiative of institutions where instruction in international law is lacking, to take steps toward providing such instruction by visiting professors or lecturers, this instruction to be given in courses, and not in single lectures, upon substantive principles, not upon popular questions

of momentary interest, and in a scientific spirit, not in the interest of any propaganda.

(b) That members of the American Society of International Law, qualified by professional training, be invited by the Executive Council or the Executive Committee of the Society to give such courses, and that provision be made, through the establishment of lectureships or otherwise, to bear the necessary expenses of the undertaking;

(c) That the Standing Committee on the Study and Teaching of International Law and Related Subjects of the American Society of International Law, the appointment of which was recommended in Resolution No. 1, be requested to ascertain what institutions are in need of additional instruction in international law and endeavor to find means of affording such assistance as may be necessary to the teaching staff of the said institutions or of supplying the additional instruction by lecturers chosen by the said Committee and approved by the Executive Council or Executive Committee.

(d) That steps be taken to bring to the attention of every college at present not offering instruction in international law the importance of this subject and the readiness of the American Society of International Law, through its Standing Committee on the Study and Teaching of International Law and Related Subjects, to cooperate with such institutions in introducing or stimulating instruction.

This resolution is approved and in part carried out. The detailed steps to be taken to carry out the other recommendations are under consideration and provision has been made to enable the Committee to put the same into effect.

#### RESOLUTION No. 13

*Resolved*, That this Conference hereby requests and recommends that universities having summer schools offer summer courses in international law.

*Resolved further*, That the American Society of International Law, through its Standing Committee on the Study and Teaching of International Law and Related Subjects, is hereby requested to endeavor to stimulate a demand for courses in international law in summer schools.

This resolution has been carried out.

#### RESOLUTION No. 14

*Resolved*, That the Conference recommends the establishment and encouragement in collegiate institutions of specialized courses in preparation for the diplomatic and consular services.

It is the opinion of the Standing Committee that courses in international law and diplomacy should be of such comprehensive character as to prepare the student broadly for any form of service to which he may be called. The total number of vacancies in the diplomatic, consular or insular service in any one year would hardly seem to justify extended specialization on such branches. The sounder educational policy would seem to be to request the Department of the Government having such examinations in charge to make the examinations for admission to the service general though thorough in character, and to require subsequent special preparation according to the post to which the candidate having an adequate general preparation is to be assigned. The service would thus obtain a larger number of candidates from which to choose, the essential breadth of preparation would be secured, the development of special fitting schools would be discouraged and a reasonable equality of opportunity would be extended to candidates from all parts of the country, as would be desirable under the American system of government.

#### RESOLUTION No. 15

*Resolved*, That the Conference recommends that the study of international law be required in specialized courses in preparation for business.

The general principles involved in the Standing Committee's conclusions upon Resolution No. 14 apply to Resolution No. 15. Considering the interests of business, the broad preparation is essential; and accordingly courses of such nature in international law and diplomacy should be included in adequate business training.

GEORGE GRAFTON WILSON, *Chairman*.

PHILIP MARSHALL BROWN.

AMOS S. HERSHEY.

CHARLES CHENEY HYDE.

HARRY PRATT JUDSON.

ROBERT LANSING.

JESSE S. REEVES.

ALPHEUS H. SNOW.

JAMES BROWN SCOTT, *Secretary*.

WASHINGTON, D. C., April 29, 1916.

#### NOTE

The List of Members of the Society was corrected up to April 1, 1916, and printed in the Proceedings of the Ninth Annual Meeting. But few changes in the membership have occurred within the intervening three months, and the list is therefore not reprinted in this volume.

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